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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,

OF THE COLORADO BAR.

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CASES REPORTED IN VOLUME XIV.

Allen v. Barkley, 246.
Allen, Birmingham v. 14.
Attorney General v. Bay State M. Co., 158.
Auditor General, Jackson M. Co. v. 182.

Baker v. King, 404.
Baker, Shoenberger v. 412.
Barkley, Allen v. 246.
Barksdale v. Finney, 541.
Barnum v. Landon, 250.
Basset v. Basset, 359.
Baxter, Bayles v. 561.
Bayles v. Baxter, 561.
Bay State M. Co., Att'y Gen. v. 158.
Bell v. Schultz, 77.
Berryhill, Corbett v. 671.
Bickel's App., 591.
Bird, Douty v. 454.
Birmingham v. Allen, 14.
Black Diamond C. M. Co., People v. 162.
Black Diamond Coal Co., Robinson v. 93.
Bond v. Mount Hope Iron Co., 500.
Boston Franklinite Co. v. Condit, 301.
Bowden, Northam v. 485.
Boylan v. Huguet, 503.
Bradley, Rowe v. 431.
Brewster v. Sime, 573.
Briggs v. Davis, 585.
Briggs Iron Co. v. North Adams Iron Co., 482.
Bronson v. Lane, 348.
Buck v. Lodge, 623.

Cadwalader's App., 565.
Caledonia S. M. Co., Gold Hill v. 202.
Carlyon v. Lovering, 397.
Castor v. McShaffery, 498.
Chadwick v. Coleman, 9.
Chadwick, Coleman v. 9.
Chollar Potosi Co., City of Virginia v. 120.
Clark, Henshaw v. 434.
Clark v. Jones, 342.
Clavering v. Clavering, 358.
Clegg v. Clegg, 289.
Coleman's App., 221.
Coleman v. Chadwick, 9.
Coleman, Chadwick v. 9.
Columbia Conduit Co. v. Com., 197.
Com., Columbia Conduit Co. v. 197.
Com. v. Ocean Oil Co., 126.
Com. v. Penn. Gas Coal Co., 163.
Condit, Boston F. Co. v. 301.
Cooney, Rogers v. 85.
Corbett v. Berryhill, 671.

Corning Tunnel & M. Co. v. Pell, 612.
Davis, Briggs v. 585.
Davis v. Treharne, 60.
Dils, Logan v. 662.
Douty v. Bird, 454.
Doyle v. Peerless Petroleum Co., 569.
Driscoll, Gilmore v. 37.
Dundas v. Muhlenberg, 437.

Early v. Friend, 271.
Elliot, Payne v. 515.
Ensminger v. McIntire, 440.
Eureka Cons. M. Co., State v. 165.

Finney, Barksdale v. 541.
Fiori, Raffeto v. 469.
Fisher v. Worrall, 624.
Fletcher, Mawson v. 657.
Forbes v. Gracey, 183.
Forney, Willis v. 389.
Forsyth v. Wells, 493.
Fothergill v. Phillips, 677.
Friend, Early v. 271.
Frisbee v. Irvin, 344.
Frisbee's Appeal, 344.

Gear, U. S. v. 403.
Gilmore v. Driscoll, 37.
Gold Hill v. Caledonia S. M. Co., 202.
Gracey, Forbes v. 183.
Graham v. Pierce, 308.
Greenwood's App., 603.
Gregory v. Harris, 91.
Grubb's App., 221.

Hale & Norcross Co. v. Storey County, 115.
Hamill v. Thompson, 696.
Hamilton, Kahn v. 608.
Hanlin, Irvine v. 241.
Hargrave v. Smith, 395.
Harris, Gregory v. 91.
Harris, Irwin v. 534.
Harris v. Tyson, 634.
Haverty, Murray v. 325.
Henshaw v. Clark and 103 Chinamen, 434.
Hitchens v. Nougues, 649.
Hoeveler v. Mugele, 654.
Holley, Marsh v. 687.
Homfray, Phillips v. 677.
Hope M. Co. v. Kennon, 189.
Horner v. Watson, 1.
Huff v. McDonald, 262.
Huguet, Boylan v. 503.
Hugunin v. McCunniff, 463.

Irby, Yahoola River Co. v. 460.
Irvin, Frisbee v. 344.
Irvine v. Hanlin, 241.
Irwin v. Harris, 534.

Jackson, Jones v. 72.
Jackson v. Walton, 488.
Jackson M. Co. v. Auditor General, 182.
Jenkins v. Redding, 647.
Jess, Wilms v. 56.
Job v. Potton, 329.
Johnson v. Lamping, 450.
Jones, Clark v. 342.
Jones v. Jackson, 72.

Kahn v. Hamilton, 608.
Kennon, Hope M. Co. v. 189.
Keys v. Little York Co., 95.
King, Baker v. 404.
Kruttschnitt, State v. 130.
Kuhn v. McAllister, 512.

Lambard, Melton v. 695.
Lamping, Johnson v. 450.
Lane, Bronson v. 348.
Landon, Barnum v. 250.
Lincoln v. Rodgers, 79.
Little Pittsburg M. Co., Stanley v. 214.
Little York Co., Keyes v. 95.
Lodge, Buck v. 623.
Logan v. Dils, 662.
Logan v. Washington County, 108.
Lookabill, Stith v. 588.
Lovering, Carlyon v. 397.

Manhattan S. M. Co., State v. 149.
Marsh v. Holley, 687.
Mather v. Trinity Church, 472.
Mawson v. Fletcher, 657.
Melton v. Lambard, 695.
Moore, State v. 110.
Mount Hope Iron Co., Bond v. 500.
Mugele, Hoeveler v. 654.
Muhlenberg, Dundas v. 437.
Murray v. Haverty, 325.
McAllister, Kuhn v. 512.
McAndrews v. Tippett, 616.
McCarron v. O'Connell, 429.
McCunniff, Hugunin v. 463.
McDonald, Huff v. 262.
McIntire, Ensminger v. 440.
McShaffery, Castor v. 498.

Neel v. Neel, 363.
Nelson, U. S. v. 381.
North Adams Iron Co., Briggs Iron Co. v. 482.
Northam v. Bowden, 485.
Northern Belle M. & M. Co., State v. 211.
North Pennsylvania C. Co. v. Snowden, 294.
Nougues, Hitchens v. 649.

Ocean Oil Co., Com. v. 126.
O'Connell, McCarron v. 429.

Palmer v. Williams, 579.
Payne v. Elliot, 515.
Peerless Petroleum Co., Doyle v. 569.
Pell, Corning Tunnel Co. v. 612.
Penn. Gas Coal Co., Com. v. 163.
People v. Black Diamond C. M. Co., 162.
Phillips, Fothergill v. 677.
Phillips v. Homfray, 677.
Phillips, Scranton v. 48.
Pierce, Graham v. 308.
Potton, Job v. 329.

Raffeto v. Fiori, 469.
Randolph Township, State v. 103.
Redding, Jenkins v. 647.
Reinhard, Weber v. 175.
Roberts v. Rose, 441.
Robinson v. Black Diamond C. Co., 93.
Rodgers, Lincoln v. 79.
Rogers v. Cooney, 85.
Rogers v. Soggs, 375.
Rose, Roberts v. 441.
Rowe v. Bradley, 431.

Schultz, Bell v. 77.
Scranton v. Phillips, 48.
Shaw v. Wallace, 420.
Shoenberger v. Baker, 412.
Sime, Brewster v. 573.
Smith, Hargrave v. 395.
Snowden, North Pa. C. Co. v. 294.

Soggs, Rogers v. 375.
Spring Creek Co., Tartar v. 371.
Stafford, Wilkinson v. 522.
Stanley v. Little Pittsburg M. Co., 214.
State v. Eureka Cons. M. Co., 165.
State v. Kruttschnitt, 130.
State v. Manhattan S. M. Co., 149.
State v. Moore, 110.
State v. Northern Belle M. & M. Co., 211.
State v. Randolph Township, 103.
Stith v. Lookabill, 588.
Storey County, Hale & Norcross Co. v. 115.

Tartar v. Spring Creek Co., 371.
Thompson, Hamill v. 696.
Tippett, McAndrews v. 616.
Treharne, Davis v. 60.
Trinity Church, Mather v. 472.
Tyson, Harris v. 634.

U. S. v. Gear, 403.
U. S. v. Nelson, 381.

Virginia, City of v. Chollar Potosi M. Co., 120.

Waddell, Wilson v. 25.
Wallace, Shaw v. 420.
Walton, Jackson v. 488.
Washington County, Logan v. 108.
Watson, Horner v. 1.
Weber v. Reinhard, 175.
Wells, Forsyth v. 493.
Wilkinson v. Stafford, 522.
Williams, Palmer v. 579.
Willis v. Forney, 389.
Wilms v. Jess, 56.
Wilson v. Waddell, 25.
Worrall, Fisher v. 624.
Wright, Yandes v. 32.

Yahoola River Hydraulic Co. v. Irby, 460.
Yandes v. Wright, 32.

TABLE OF CASES CITED IN VOLUME XIV.

THOSE CASES PRINTED IN ITALICS ARE TO BE FOUND REPORTED IN THE SERIES.

Abel v. Love, 355. 11 M. R. 350.
Abernathie v. Cons. Va. Co., 356.
Acton v. Blundell, 3, 11. 15 M. R. 168.
Adair v. Brimmer, 611. 5 M. R. 683.
Adam v. Briggs Co., 301, 307, 355. 13 M. R. 225.
Adams v. Ore Knob Co., 396. 3 M. R. 183.
Adams Co. v. Senter, 387. 1 M. R. 241.
Alderson v. Ennor, 437. 8 M. R. 526.
Allen v. Barkley, 271. 14 M. R. 246.
Allen v. Harris, 483.
Allen v. Smith, 477.
Almy v. State, 189, 219.
Alva Co. v. Benson Co., 471.
Anderson v. Hapler, 472.
Anderson v. Harvey, 471. 7 M. R. 291.
Anderson v. Kennedy, 657.
Anderson v. Nicholas, 514, 518.
Arbegust v. Louisville, 208.
Archer v. Williams, 509.
Aspden v. Seddon, 62, 70.
Atkins v. Gamble, 513, 518. 13 M. R. 514.
Attersoll v. Stevens, 471. 10 M. R. 67.
Att'y-Gen. v. Gleg, 305.
Att'y-Gen. v. Leicester, 550.
Attwood v. Fricot, 470. 2 M. R. 306.
Aughinbaugh v. Poppenheffer, 12.
Aurora City v. West, 229.
Austin v. Huntsville Co., 471, 493. 9 M. R. 115.
Aycinena v. Peries, 657.
Ayer v. Ashmead, 471.
Ayres v. French, 518.

Backenstoss v. Stahler, 604.
Backhouse v. Bonomi, 17. 13 M. R. 677.
Bacon's Appeal, 587.
Bagot v. Bagot, 369. 15 M. R. 130.
Baird v. Williamson, 4, 94. 4 M. R. 368.
Baker v. Howell, 241. 12 M. R. 73.
Baker v. King, 412. 14 M. R. 404.
Baker v. Wheeler, 328, 495.
Ball v. Nye, 41.
Ballacorkish Co. v. Harrison, 12.
Ballard v. Burgett, 579.
Balson v. Benstead, 12.
Bank v. Fordyce, 655.
Bank of Metropolis v. New Eng. Bank, 579.
Bank of Montgomery v. Reese, 604.
Barber v. Cazalis, 622. 2 M. R. 684.
Bardwell v. Kinsey, 41.
Barnet v. Dougherty, 598.
Barnhart v. Riddle, 655.
Barnum v. Landon, 237. 14 M. R. 250.
Barstow v. Savage M. Co., 520.
Bartlet v. Harlow, 307.

Barton Coal Co. v. Cox, 471. 10 M. R. 157.
Barwell v. Kensey, 41.
Bayles v. Baxter, 591. 14 M. R. 561.
Beard v. Murphy, 46.
Bedford v. Bagshaw, 635. 6 M. R. 514.
Belcher Co. v. Deferrari, 470.
Bell v. Bell, 634.
Bell v. Josselyn, 47.
Bell v. Schultz, 95. 14 M. R. 77.
Bellasis v. Compton, 564.
Benedict v. Lynch, 633.
Benfieldside Board v. Consett Co., 62.
Bennett v. Thompson, 238.
Bercich v. Marye, 520. 13 M. R. 544.
Berry v. Heard, 478.
Binney v. Ince Hall Co., 126. 11 M. R. 410.
Birchard v. Booth, 621.
Bishop of Ely v. Kenrick, 296.
Blackett v. Bradley, 7, 70.
Blackwell v. Overly, 611. 10 M. R. 531.
Blake v. Thorne, 670.
Blanchard v. Tyler, 583.
Blewett v. Coleman, 355. 11 M. R. 160.
Blight v. Ashley, 633.
Blossom v. Brightman, 307.
Bly v. U. S., 388.
Bodicoat v. Steers, 232.
Boggs v. Merced Co., 436. 10 M. R. 334.
Bonomi v. Backhouse, 44.
Bostwick v. McEvoy, 697.
Bower v. Peate, 23.
Bowers v. Keesecker, 677.
Bowker v. Goodwin, 503, 511. 10 M. R. 149.
Bowman v. Irons, 624. 13 M. R. 312.
Bowser v. Maclean, 290.
Boyd v. Breece, 655.
Boylan v. Huguet, 514, 518, 603. 14 M. R. 503.
Bracken v. Preston, 412, 463, 471. 7 M. R. 267.
Bradburne v. Botfield, 355.
Bradley v. Harkness, 356. 11 M. R. 389.
Bradley v. Holdsworth, 556.
Bradshaw v. Omaha, 208.
Bragg v. Geddes, 561. 5 M. R. 624.
Bratton v. Mitchell, 355.
Breeze v. Haley, 149.
Brennan v. Gaston, 471. 7 M. R. 424.
Brewer v. Fleming, 472.
Brereton v. Cowper, 632.
Bridenbecker v. Lowell, 578.
Briggs v. Haycock, 500.
Briggs v. Wangenheim, 514.
Brinkerhoff v. Brown, 100.
Broadbent v. Wilks. 6, 71.
Broome v. Wooton, 484.
Brophy Co. v. Brophy Co., 580. 10 M. R. 601.
Brown v. Caldwell, 472, 494. 12 M. R. 674.
Brown v. Houston, 182.
Brown v. Robins, 45, 59. 13 M. R. 669.
Brown v. Slater, 673.
Brown v. Smith, 102. 4 M. R. 539.
Brown v. Torrence, 70. 10 M. R. 692.
Brown v. Warren, 356.
Brukhardt v. Hanley, 37.
Brumagim v. Tillinghast, 189, 219.
Brunswick v. Winter, 647.
Buccleuch v. Wakefield, 70.
Buchanan v. Andrew, 60.
Budd v. Multnomah Ry., 500.
Buffalo R. R. v. Cary, 573.
Bulkley v. Dolbeare, 468.
Burdge v. Underwood, 378. 4 M. R. 517.
Burgner v. Homphrey, 70.
Burnett v. Caldwell, 466, 699.
Bushnell v. Proprietors of Ore Bed. 102. 3 M. R. 258.
Bussell v. Stinson, 700.
Buxton v. Lister, 630.
Byard v. Holmes, 696. 6 M. R. 598.

Calcraft v. Roebuck, 623.
Caldwell v. Fulton, 11, 52. 3 M. R. 238.

Caldwell v. Moore, 181.
Caledonian Ry. v. Sprot, 44, 69.
Campbell v. Leach, 359, 369.
Campbell v. McClenachan, 655.
Campbell v. *Rankin*, 349, 471. 12 M. R. 257.
Canfield v. Andrew, 93.
Canfield v. Ford, 355. 11 M. R. 201.
Cannon v. Hatcher, 468.
Cardigan v. Armitage, 290.
Carlin v. Chappel, 69, 70.
Carlyon v. Lannan, 511.
Carmony v. Hoober, 231.
Cathcart v. Bowman. 55.
Chadwick v. Coleman, 48. 14 M. R. 9.
Chalfant v. Williams, 655. 2 M. R. 548.
Chamberlain v. Collinson, 463, 493. 9 M. R. 36.
Chapin v. First Universalist Soc., 305.
Chapman v. Bluck, 428.
Chapman v. Toy Long, 384. 1 M. R. 497.
Charles v. Eshelman, 246. 2 M. R. 65.
Charless v. Rankin, 46.
Chasemore v. Richards, 46.
Chickering v. Faile, 171.
Christie's Appeal, 348. 9 M. R. 42.
Cist v. Zeigler, 231.
Clark v. Duval, 379.
Clark v. Jones, 289, 344. 14 M. R. 342.
Clark v. Seirer, 634.
Clarke v. McIntire, 479.
Clarke v. Wilson, 623, 649.
Clavering v. Clavering, 368. 14 M. R. 358.
Clayton v. Corby, 400.
Clowser v. Joplin M. Co., 356. 10 M. R. 222.
Coal Creek Co. v. Moses, 388, 471, 493, 678. 15 M. R.—
Cole Co. v. Virginia Co., 622. 7 M. R. 503.
Coleman's Appeal, 355. 14 M. R. 221.
Coleman v. Blewett, 471.
Coleman v. Chadwick, 1, 36, 52, 59. 14 M. R. 9.
Coleman v. Coleman, 228, 356. 11. M. R. 183.
Coltness Co. v. Black, 219.
Com. Bank v. Kortright, 578.
Com. v. Hamilton M. Co., 161, 220.
Com. v. Ocean Oil Co., 164. 14 M. R. 126.
Com. v. Penn Gas Coal Co., 126. 14 M. R. 163.
Comparet v. Burr, 517.
Comyn v. Wheatly, 52. 5 M. R. 198.
Conwell v. Pumphrey, 673.
Corson v. Mulvany, 662.
Coryell v. Cain, 85. 5 M. R. 226.
Cotton v. U. S., 380.
Courchaine v. Bullion Co., 485. 12 M. R. 235.
Covill v. Hill, 579.
Cowell v. Colo. Springs Co., 573.
Coweta Falls Co. v. Rogers, 620.
Cow Run Co. v. Lehmer, 521.
Coxe v. Smith, 296.
Crary v. Campbell, 325. 3 M. R. 270.
Crawford v. Moore, 611.
Crocker v. Crocker, 578.
Crompton v. Lea, 29. 6 M. R. 179.
Cromie v. Bull, 522.
Crump v. U. S. M. Co., 569. 3 M. R. 454.
Cumberland Co. v. Parish, 611. 1 M. R. 423.
Cumberland v. Sherman, 611. 1 M. R. 332.

Darcy v. Askwith, 369.
Darst v. Rush, 102.
Davis v. Evans, 468.
Davis v. Patrick, 450.
Davis v. Robinson, 519.
Deiman v. Fort Madison, 208.
Dent v. Dent, 369.
Dexter v. Providence Co., 11.
Dexter Co. v. Dexter, 355. 4 M. R. 291.
Dey v. Dunham, 700.
Dickinson v. Durfee, 534.

Dilly v. Doig, 99.
Dixon v. Hill, 583.
Docker v. Somes, 268, 522.
Doe v. Meyrick, 11.
Dougherty v. Creary, 329, 356. 1 M. R. 35.
Dower v. Richards, 622.
Downes v. Back, 508.
Dresser v. Dresser, 235.
Duddell v. Simpson, 659.
Dugdale v. Robertson, 11, 36. 13 M. R. 662.
Durach's App., 178.
Dwight v. Whitney, 12.

Eadon v. Jeffcock, 62, 66.
Earl of Cardigan v. Armitage, 290.
Early v. Friend, 246, 316. 14 M. R. 271.
Earp's Appeal, 587.
Eason v. Henderson, 277.
East Saginaw Co. v. East Saginaw, 219.
Ebervale Coal Co. v. Com., 219.
Ecker v. Moore, 463, 472. 12 M. R. 685.
Edsall v. Merrill, 271, 356.
Ege v. Kille, 460, 471, 493. 10 M. R. 212.
Elliott v. Hughes, 509.
Elliott v. Powell, 495.
Elston v. Kennicott, 172.
Empire Co. v. Bonanza Co., 470.
English v. Johnson, 84, 89. 12 M. R. 202.
Ensign v. Kellogg, 483.
Erie Ry. v. New Jersey, 161.
Esmond v. Chew, 79, 82, 102. 5 M. R. 174.
Eyre v. Popham, 629.

Fairbank v. Phelps, 483.
Falls v. Carpenter, 396. 6 M. R. 397.
Farrand v. Marshall, 70.
Fatman v. Lobach, 578.
Fellows v. Gwydyer, 629.
Ferrand v. Wilson, 369.
Ferrant v. Thompson, 495.
Findlay v. Smith, 363, 388. 13 M. R. 182.
First Nat. Bank v. Bissell, 350, 541. 11 M. R. 546.
Fisher v. Worrall, 396. 14 M. R. 624.
Fitzgerald v. Urton, 374, 378, 471. 12 M. R. 198.
Fletcher v. Rylands, 94.
Flint v. Brandon, 26. 13 M. R. 308.
Foley v. Fletcher, 219. 4 M. R. 130.
Foley v. Wyeth, 43, 46.
Forbes v. Gracey, 115, 162. 14 M. R. 183.
Forbes v. McDonald, 611.
Forcey's Appeal, 585.
Forsyth v. Wells, 238. 14 M. R. 493.
Fothergill v. Phillips, 680. 14 M. R. 677.
420 Mining Co. v. Bullion Co., 342. 11 M. R. 608.
Fowle v. Bigelow, 673.
Fox v. Harding, 621.
Fox v. Mackreth, 611.
Franklin Co. v. McMillin, 363, 369. 10 M. R. 224.
Fraser v. Swansea Canal Nav., 520.
Freck v. Blackiston, 289.
Freeman v. Clute, 620.
Freeman v. Cook, 604.
French v. Gray, 258.
Frisbee's App., 294. 14 M. R. 344.
Fuhr v. Dean, 404. 6 M. R. 216.
Fullam v. Cummings, 517.

Gaines v. Chew, 101.
Gainsford v. Carroll, 509.
Ganter v. Atkinson, 471. 9 M. R. 13.
Garrett Co. v. Franklin Co., 219.
Garrison v. Sampson, 85.
Gayford v. Nicholls, 47.
Gaved v. Martyn, 402.
Gear v. Shaw, 470. 7 M. R. 643.
Gehrens v. Huhn M. Co., 616. 2 M. R. 632.
Gesner v. Gas Co., 520.
Getty v. Devlin, 541, 696. 7 M. R. 29.
Gibbs v. Bartlett, 229.
Gibson v. Mason, 209.
Gibson v. Puchta, 94. 12 M. R. 227.

Gillan v. Hutchinson, 378. 2 M. R. 317.
Gillett v. Bowen, 611.
Gillett v. Johnston, 12.
Gillett v. Treganza, 588. 7 M. R. 432.
Glasgow v. Hurlet Alum Co., 11.
Golden Gate Co. v. Superior Court, 102.
Goller v. Fett, 356. 11 M. R. 171.
Gore v. McBrayer, 356. 1 M. R. 645.
Grant v. Parker, 356.
Gray v. Truby, 611.
Green v. Ashland Co., 472. 12 M. R. 692.
Greening v. Wilkinson, 509.
Greenleaf v. Francis, 46.
Gresley v. Mousley, 471, 482.
Griswold v. Johnson, 307.
Grubb's App., 222. 3 M. R. 416.

Haak v. Breidenbach, 230.
Haddock v. Haddock, 700.
Hail v. Reed, 520. 11 M. R. 103.
Haldane v. Duche, 243.
Haldeman v. Bruckhart, 12. 5 M. R. 108.
Hale Co. v. Storey County, 183. 14 M. R. 115.
Hall v. Linn, 561.
Hall v. Luzerne County, 220.
Hamilton v. Hamilton, 601.
Hammett v. Philadelphia, 178.
Hancock v. Day, 283.
Hardenbergh v. Bacon, 611. 1 M. R. 352.
Hardt v. Liberty Hill Co., 102.
Harker v. Birkbeck, 471.
Harlan v. Harlan, 472, 495.
Harris v. Equator Co., 695. 12 M. R. 178.
Harris v. Ryding, 6, 36, 58, 69.
Harrison v. Harrison, 508.
Hart v. Plum, 214, 219.
Hart v. Ten Eyck, 513.
Hartford Co. v. Miller, 301, 355. 691. 3 M. R. 353.
Harts v. Brown, 565, 611. 4 M R. 1.
Hartshorn v. Worcester, 44.
Hasbrook v. Paddock, 673.
Hawley v. Clowes, 296.
Hay v. Cohoes Co., 46.
Hazleton v. Week, 471.
Hearst v. Egglestone, 219.
Hellier v. Twiford, 358.
Hellman v. Hellman, 587.
Henderson v. Eason, 235, 277.
Hendricks v. Spring Valley Co., 71.
Herdic v. Young, 238.
Hersey v. Barron Co., 219.
Hess v. Winder, 90. 12 M. R. 217.
Hewes v. Parkman, 483.
Hext v. Gill, 59, 68.
Hidden v. Jordan, 563.
Hide v. Thornborough, 46.
Hill v. Canfield, 604.
Hill v. Newman, 11. 4 M. R. 513.
Hill v. Smith, 79. 4 M. R. 597.
Hilliard v. Richardson, 47.
Hilton v. Granville, 6, 71, 400.
Hilton v. Woods, 683. 10 M. R. 110
Himes v. Johnson, 356.
Hinkle v. San Francisco Co. 622. 5 M. R. 645.
Hoadley v. McLaine, 483.
Hobbs v. Amador Co., 102.
Holcomb v. Coryell, 307.
Holcomb v. Holcomb, 305.
Holt v. Robertson, 283.
Homer v. Knowles, 59.
Hoosac Co. v. Donat, 420.
Hopkins v. Atlantic R. R., 622.
Hopkins v. Noyes, 356. 15 M. R. —.
Horner v. Watson, 36, 48, 59. 14 M. R. 1.
House Bill No. 70, *In re*, 149.
Hoy v. Smythies, 659.
Hudspeth v. Wilson, 517.
Hughes v. Devlin, 355. 12 M. R. 241.
Hugunin v. McCunniff, 404. 14 M. R. 463.
Humble v. Mitchell, 556.
Humphreys v. Franks, 287.
Humphries v. Brogden, 7, 11, 34, 46, 58, 70.

Hunt v. Peake, 37, 45.
Hunter v. McHose, 396.
Huston v. Wickersham, 470.
Hutchinson v. Chase, 327.
Hyatt v. Griffiths, 287.

Illinois Coal Co. v. Caldwell, 420.
Irnham v. Child, 629.
Irvine v. Dunham, 611
Irving v. Stocker, 402.
Irwin v. Covode, 358, 370. 15 M. R. 120.
Irwin v. Davidson, 294. 7 M. R. 237.
Irwin v. Phillips, 373, 378. 15 M. R. 178.
Irwin v. Shoemaker, 657.
Izard v. Bodine, 235.

Jackson v. Moncrief, 699.
Jackson v. Sellick, 476.
Jackson v. Stevens, 11.
Jamison v. McCredy, 234.
Jenkins v. McConico, 604.
Job v. Potton, 325. 14 M. R. 329.
Johnson v. Jones, 579.
Jones v. Festiniog Ry., 94.
Jones v. Robbins, 396.
Jones v. Wagner, 4, 11, 36, 48, 59. 13 M. R. 690.

Kahn v. Old Telegraph M. Co., 294. 7 M. R. 559.
Karmuller v. Krotz, 673.
Kauffman v. Griesemer, 3.
Keats v. Hugo, 46.
Keble v. Arthurs, 410.
Keeler v. Fassett, 517.
Keisel v. Earnest. 604.
Kellogg v. Kellogg, 466.
Kelly v. Ruble, 611.
Kendall v. Stokes, 131.
Kennebeck v. Call, 477.
Keyse v. Powell, 426.
Kier v. Peterson, 520. 8 M. R. 499.
Kile v. Tubbs. 85.
Kimmins v. Wilson, 635. 2 M. R. 159.
Kinlyside v. Thornton, 618.
Kinney v. Cons. Va. Co., 450. 10 M. R. 457.
Kirkham v. Sharp, 234.
Kittaning Coal Co. v. Com., 220.
Kuhn v. McAllister, 518. 14 M. R. 512.

Ladda v. Hawley, 387.
Lake County v. Sulphur Bank Co., 219, 220.
Lakin v. Sierra Buttes M. Co. 592, 611.
Lane v. Debenham, 305.
Lasala v. Holbrook, 46.
Latham v. Hickey, 699.
Lathrop v. Pollard, 522.
Lawrence v. Fast, 170.
Lee v. Taylor, 699.
Leggett v. Dubois, 564.
Lehigh Crane Co. v. Com., 220.
Lehman v. Kellerman, 472.
Leman v. Whitley, 565.
Lewis v. Dubose, 452.
Lincoln v. Rodgers, 72. 14 M. R. 79.
Linton v. Athens, 209.
Little Pittsburg Co. v. Stanley, 214.
Little Schuylkill Co. v. Richards, 77, 437. 10 M. R. 661.
Little York Co. v. Keyes, 102.
Livezay's Appeal, 585.
Livingston v. Moingona Co., 69, 70. 10 M. R. 696.
Lockwood v. Canfield, 564.
Lockwood Co. v. Lawrence, 77.
Logan v. Driscoll, 83, 94, 102. 6 M. R. 172.
Long v. Perdue, 604.
Long Dock Co. v. Mallery, 622.
Lord v. Wightwick, 611.
Lord Cullen's Case, 477.
Lord Mountjoy's Case, 354. 9 M. R. 175.
Low v. Lincoln County Court, 108.
Luckhart v. Ogden, 396. 2 M. R. 601.
Lyon v. Gormley, 238, 493, 520. 8 M. R. 383.
Lynn's Appeal, 370. 15 M. R. 126.
Lytle v. Lee, 230.

Macbryde v. Weeks, 389, 688. 13 M. R. 346.

Magaw v. Clark, 601.
Mallett v. Uncle Sam Co., 356. 1 M. R. 17.
Manigault v. Deas, 248.
Manville v. Parks, 250. 15 M. R. —.
Markham v. Jaudon, 506.
Markoe v. Wakeman, 301.
Marsden v. Cambridge, 44.
Marshall v. Trumbull, 327.
Martin v. Porter, 238, 493, 495, 683. 10 M. R. 74.
Martin v. Thompson, 472.
Marvel v. Merritt, 220.
Marvin v. Brewster Co., 32, 36, 70, 348. 13 M. R. 40.
Mason v. Crosby, 241.
Mason v. Norris, 355. 11 M. R. 140.
Mason v. Pewabic M. Co., 542.
Masterton v. Brooklyn, 621.
Mather v. Trinity Church, 243, 411, 495. 14 M. R. 472.
Matthews v. Coe, 508.
Matthews v. Hamilton, 608.
Matthiessen Zinc Co. v. La Salle, 622.
Mawson v. Fletcher, 687. 14 M. R. 657.
Maye v. Yappen, 471. 10 M. R. 101.
Meeker v. Chicago Steel Co., 569. 10 M. R. 202.
Merced M. Co. v. Fremont, 113. 7 M. R. 309.
Mercer v. Jones, 510.
Mershon v. Duer, 561.
Meyer v. Arthur, 220.
Meyer v. Larkin, 220, 471.
Midland Ry. v. Checkley, 69.
Mill v. New Forest, 399.
Millard v. Hathaway, 561.
Miller v. Henderson, 655.
Milton v. Hogue, 611.
Mix v. Smith, 410.
Monroe v. North P. M. Co., 616. 2 M. R. 652.
Moody v. Keeney, 517.
Mooers v. Wait, 495.
Morgan v. Powell, 238, 683. 10 M. R. 79.
Morganstern v. Thrift, 356.
Morris v. Tarrin, 243.
Morrison v. Morrison, 655.
Morton v Eden, 532.
Murley v. Ennis, 241. 12 M. R. 360.
Musselman v. Stoner, 655.
McAllister v. Kuhn, 512.
McAndrew v. Walsh, 622.
McArthur v. Seaforth, 508.
McCann v. Atherton, 697.
McCanna v. Johnston, 355.
McCarty v. Boise City Co., 77.
McCord v. Oakland Co., 262, 329, 357.
McCraney v. Griffin, 673.
McCullough v. Irvine, 12.
McDowell v. Hendrix, 359. 9 M. R. 96.
McFarland v. Culbertson, 86.
McGonigle v. Atchison. 437, 471.
McGoon v. Ankeny, 72. 1 M. R. 9.
McGuire v. Grant. 46, 48.
McKay v. Mumford, 287.
McKee v. Brooks, 498.
McKeon v. Bisbee, 113. 2 M. R. 309.
McKnight v. Ratcliff, 441, 454, 459. 11 M. R. 364.
McLean Coal Co. v. Long, 471, 520. 10 M. R. 193.
McMahon v. Burchell, 279.
McMillan v. Hafley, 468.
McNear v. McComber, 677.
McNeil v. Gates, 534.
McNeillie v. Acton, 585.

Napier v. Bulwinkle, 46.
Neel v. Neel, 388. 14 M. R. 363.
Neiler v. Kelley, 517, 604.
Nelson v. Clay, 235.
Nelson v. Hoch, 70.
Nelson v. O'Neal, 79, 102. 4 M. R. 275.
Nelthrope v. Holgate, 659.
Newman v. Dreifurst, 308, 356.
New York R. R. v. Schuyler, 100.
Nicklin v. Williams, 47. 13 M. R. 650.
Norris' Appeal, 348.
N. A. Railroad v. Peterson, 11.

North Eastern R. R. v. Elliott, 70.
North Pa. Co. v. Snowden, 344, 347. 14 M. R. 294.
Norton v. Frecker, 347.
No. 5 Mining Co. v. Bruce, 387. 3 M. R. 147.

Ogden's Appeal, 587.
O'Keiffe v. Cunningham, 102. 9 M. R. 451.
Olcott v. Bynum, 611.
Oliver v. Cornwall Copper Co., 197.
Oliver v. Piatt, 534.
O'Meara v. North Am. M. Co., 509.
O'Rourke v. Percival, 630.
Osborne v. Endicott, 563.
Outram v. Morewood, 471. 5 M. R. 184.
Owen v. Routh, 508.

Packet Co. v. Sickles, 230.
Page v. Fowler, 472, 507.
Painter v. Newby, 659.
Palmer v. Cornith, 220.
Palmer v. Fleshees, 41.
Palmer v. Flessier, 41.
Panton v. Holland, 46.
Parke v. Chadwick, 655.
Partridge v. Scott, 22, 37, 44. 13 M. R. 640.
Patchen v. Keeley, 85, 404. 471.
Patterson v. Hitchcock, 396. 5 M. R. 542.
Peabody v. Minot, 307.
Peck v. Carpenter, 235.
Pelican Co. v. Snodgrass, 611.
Penn'a Coal Co. v. Sanderson, 93. 11 M. R. 79.
People v. Cohen, 163.
People v. Frisbie, 163.
People v. Gerke, 163.
People v. Gold Run Co., 96, 102.
People v. Morrill, 101.
People v. Morrison, 110, 117.
People v. McCreery, 133, 163.
People v. Naglee, 220.
People v. Shearer, 110, 163.
Perkins v. Prout, 635. 2 M. R. 139.
Persch v. Quiggle, 604.
Peters v. Ballistier, 483.
Phelps v. Green, 296.
Phila. Ass'n v. Wood, 178.
Phillips v. Buckingham, 629.
Phillips v. Homfray, 679. 14 M. R. 677.
Pickering v. Pickering. 308.
Pico v. Columbet, 235.
Pierce v. Gilson, 517.
Pierce v. Pierce, 611. 15 M. R. —.
Pinckard v. Woods, 550.
Pittsburg & C. R. R. v. Com., 178.
Platt v. Union Pac. R. R., 204.
Player v. Roberts, 475, 494.
Player v. Warn, 520.
Plunkett v. Meth. Epis. Soc., 483.
Porter v. Hill, 307.
Portland Bank v. Apthorp, 160.
Powell v. Aiken, 683.
Powell v. Smith, 495.
Prescott v. Wells Fargo & Co., 511. 6 M. R. 89.
Presnell v. Ramsour, 468.
Preston v. Stuart, 611.
Pretty v. Solly, 32. 8 M. R. 301.
Price v. Reeves, 561.
Pringle v. Taylor, 289. 2 M. R. 458.
Pritchard v. Wallace, 564.
Proud v. Bates, 11, 70. 15 M. R. 227.

Queen v. Nevill, 11.

Ragan v. McCoy, 235.
Railroad Co. v. Gaines, 204.
Randolph v. Halden, 71. 9 M. R. 29.
Real del Monte Co. v. Pond M. Co., 358. 7 M. R. 452.
Rearich v. Swinehart, 655.
Rearick v. Rearick, 655.
Reddington v. Henry, 657. 3 M. R. 31.
Reed v. Reed, 370.
Reese v. Jared, 488.
Reg. v. A. & C. N. Co., 70.
Renshaw v. Gans, 655.
Reynolds v. Harris, 453.
Rhea v. Forsyth, 297.

Riborado v. Quang Pang M. Co., 91.
Rich v. Baker, 468.
Richards v. Dower, 622.
Richards v. Jenkins, 32, 70.
Richardson v. Vermont Cent. R. R., 46.
Richart v. Scott, 46.
Rider v. Union Factory, 557.
Rife v. Geyer, 587.
Riley v. Boston Co., 520.
Roberts v. Haines, 70.
Roberts v. Roberts, 235.
Robinett's Appeal, 604.
Robinson v. Imperial Co., 85. 10 M. R. 370.
Rochdale Co. v. Radcliffe, 399.
Rogers v. Cooney, 72, 471. 14 M. R. 85.
Rogers v. Taylor, 70.
Ross v. Heintzen, 356. 12 M. R. 483.
Rowbotham v. Wilson, 8, 70.
Rowe v. Bacigalluppi, 356. 5 M. R. 237.
Rowe v. Brenton, 520.
Ruffners v. Lewis, 275, 317.
Rupley v. Welch, 371. 4 M. R. 243.
Russ v. Mebius, 564.
Rutland's Case, 568.
Ryan v. Leavenworth County, 189.
Ryckman v. Gillis, 70.
Ryder v. Hulse, 305.
Rylands v. Fletcher, 29. 6 M. R. 129.,

St. Louis Mining Co. v. Sandoval Co., 541.
St. Louis Smelting Co. v. Kemp, 183. 11 M. R. 673.
St. Peter's Church v. Beach, 507.
Saltus v. Everett, 578.
Sanders' Case, 368.
Sandfoss v. Jones, 561.
San Francisco v. Flood, 189, 220.
San Francisco v. Fry, 220.
San Francisco v. Mackey, 158, 220.
Sankey v. Noyes, 85.
Sargent v. Parsons, 235, 283.
Sayer v. Pierce, 347. 1 M. R. 72.
Schley v. Lyon, 604.
Scholle v. Scholle, 565.
Schriver v. Cobeau, 587.
Scott v. Hanson, 631.
Scudder v. Anderson, 521.
Sears v. Collins, 308. 12 M. R. 401.
Settembre v. Putnam, 579. 11 M. R. 425.
Settle v. Winters, 389.
Sharpless v. Philadelphia, 178.
Shaw v. Holland, 509.
Shaw v. Spencer, 574, 611.
Shaw v. Stenton, 11. 8 M. R. 488.
Sheet's Estate, 587.
Shepherd v. Johnson, 508.
Shepler v. Scott, 396. 2 M. R. 674.
Shirley v. Stratton, 630.
Shoenberger v. Baker, 404. 14 M. R. 412.
Shovel v. Bogan, 630.
Shreck v. Pierce, 677.
Shrieve v. Stokes, 46.
Silsbury v. McCoon, 497.
Silver Bow County v. Davis, 175.
Simson v. Eckstein, 563.
Sinclair v. Jackson, 305.
Slingsby v. Barnard, 41.
Smart v. Morton, 58, 60. 13 M. R. 655.
Smith v. Adams, 11.
Smith v. Cooley, 301, 356.
Smith v. Darby, 1, 54. 13 M. R. 695.
Smith v. Doe, 378. 5 M. R. 218.
Smith v. Fletcher, 29. 6 M. R. 192.
Smith v. Hodson, 483.
Smith v. Kenrick, 3, 11, 30, 94. 6 M. R. 142.
Smith v. Martin, 41, 47.
Smith v. Sharpe, 355.
Smith v. Thackerah, 45.
Soderberg v. Crockett, 697.
Soggins v. Heard, 564.
Solomon v. Vintners Co., 46.
Southmayd v. Southmayd, 357.
Speer v. School Directors, 178.
Spencer v. Scurr, 358. 10 M. R. 388.
Spencer v. Weatherly, 468.
Springer v. Springer, 561.

Stainінger v. Andrews, 85.
Stansell v. Jollard, 46.
Starr v. Gregory Co., 396.
Starr v. Jackson, 468.
State v. California State Tel. Co., 133.
State v. Carrigan, 220.
State v. Danser, 105.
State v. Estabrook, 131, 155.
State v. Eureka Co., 211. 14 M. R. 165.
State v. Gracey, 220.
State v. Guerrero, 500. 9 M. R. 660.
State v. Moore, 183. 14 M. R. 110.
State v. Northern Belle Co., 165, 211. 14 M. R. 211.
State v. Platt, 105.
State v. Real del Monte Co., 115, 220. 4 M. R. 334.
State v. Tunis, 105.
State v. Yellow Jacket Co., 220.
Stenger v. Edwards, 356. 9 M. R. 368.
Stevens v. Guppy, 687. 13 M. R. 315.
Stewart v. Chadwick, 677. 13 M. R. 236.
Stiles v. Laird, 102, 441.
Stoakes v. Barrett, 373, 379.
Stockbridge Co. v. Cone Iron Works, 460, 471. 6 M. R. 317.
Stone v. Welling, 583.
Stonecifer v. Yellow Jacket M. Co., 588, 611. 3 M. R. 4.
Stough v. Stefani, 498.
Strong v. Gregory, 674.
Stroyan v. Knowles, 45, 70.
Stultz v. Dicky, 12.
Sturton v. Richardson, 284.
Sullivan v. Clements, 465.
Sumner v. Williams, 673.
Sunol v. Hepburn, 85.
Sury v. Pigot, 41.
Susquehanna R. R. v. Quick, 356. 1 M. R. 201.
Sutro Tunnel Co. v. Belcher Co., 622.
Suydam v. Jenkins, 508.
Swift v. Newport, 208.

Table Mt. Tunnel Co. v. Stranahan, 90. 9 M. R. 457.
Talbot v. Chamberlin, 466.
Tartar v. Spring Creek Co., 112, 378. 14 M. R. 371.
Taylor v. Parry, 521.
Taylor v. Shafto, 62, 68.
Tenant v. Goldwin, 41.
Thayer v. Wilmington Co., 396.
Thomas v. Rumsey, 230.
Thomas v. Stone, 583.
Thomas Co. v. Allentown Co., 71. 8 M. R. 36.
Thompson v. Bostick, 283.
Thompson v. Moiles, 388.
Thompson v. Toland, 573, 611. 2 M. R. 77.
Thorogood v. Robinson, 521.
Thorpe v. Brumfit, 101.
Thurston v. Hancock, 37, 42.
Tillmes v. Marsh, 348.
Tilly v. Bridges, 347.
Timber Cases, 387.
Tisdale v. Harris, 513.
Tripner v. Abrahams, 355.
Trout v. McDonald, 9. 9 M. R. 32.
Trower v. Newcome, 631.
Turner v. Reynolds, 52. 12 M. R. 190.
Turpin v. Chambers, 659.
Twining v. Morrice, 630.
Tynan v. Walker, 191.
Tyson v. Smith, 402.

Udal v. Udal, 478.
U. S. v. Benjamin, 388.
U. S. v. Heilner, 388.
U. S. v. Lane, 387.
U. S. v. McEntee, 383.
U. S. v. Smith, 387, 388.
U. S. v. Williams, 387, 388.
U. S. v. Yoder, 387.
U. S. v. Young, 381.

Van Brunt v. Schenck, 477.
Van Ness v. Packard, 12.
Van Note v. Downey, 305.
Van Rensselaer v. Van Rensselaer, 477.

Varnum v. Abbot, 307.
Veazie Bank v. Fenno, 209.
Vervalen v. Older, 325. 10 M. R. 540.
Verzan v. McGregor, 616. 2 M. R. 555.
Virginia, City of, v. Chollar-Potosi Co., 131. 14 M. R. 120.
Von Schmidt v. Bourn, 518.

Wakefield v. Buccleuch, 11, 36, 70.
Walke v. Moody, 590.
Waller v. Hughes, 183.
Waller v. Sands, 478.
Wann v. Pattengale, 602.
Ward v. Taylor, 411.
Waring v. Crow, 356. 5 M. R. 204.
Warner v. Whittaker, 583.
Wasatch Co. v. Jennings, 541.
Washington Avenue, *In re*, 178.
Waterman v. Waterman, 654.
Waters v. Stevenson, 471, 493. 10 M. R. 240.
Watt's Appeal, 565. 8 M. R. 222.
Watts v. Tibbals, 498. 5 M. R. 662.
Weese v. Barker, 356.
Weimer v. Lowrey, 378.
Wells v. Robinson, 563.
Wentworth v. Turner, 370. 7 M. R. 249.
West v. Lanier, 412, 463, 469, 471. 12 M. R. 184.
West Cumberland Co. v. Kenyon, 1. 15 M. R. 203.
Western Trans. Co. v. Marshall, 578.
Westervelt v. Gregg, 305.
Westmoreland Co.'s Appeal, 363, 370. 10 M. R. 394.
Wetherbee v. Green, 488.
Whaley v. Dawson, 100.
Wheatley v. Baugh, 11. 13 M. R. 374.
Wheeler v. Horne, 244, 284.
Whetstone v. Bowser, 12.
Whitaker v. Brown, 53. 5 M. R. 656.
Whitehead v. Parks, 12.
Whitman Co. v. Baker, 86, 388.
Wightwick v. Lord, 522.
Wilbur v. Almy, 305.
Wild v. Holt, 238, 495. 12 M. R. 182.
Wilde v. Minsterley, 40.
Wilkes v. Broadbent, 71, 401.
Wilkinson v. Heygarth, 336.
Wilkinson v. Proud, 401. 12 M. R. 261.
Williams v. Morrison, 329.
Williams v. Pomeroy Co., 403. 6 M. R. 195.
Williams v. Sheldon, 424.
Williams v. Spurr, 634. 7 M. R. 17.
Willingham v. Joyce, 629.
Wilson v. Hamilton, 230.
Wilson v. Little, 513.
Wilson v. The Mayor, 131.
Wilson v. Smith, 388.
Wilson v. Waddell, 1. 14 M. R. 25.
Wingate v. Smith, 493.
Wiswall v. Stewart, 569.
Wolcott v. Mount, 621.
Wolf v. St. Louis Co., 441. 10 M. R. 633.
Wood v. Morewood, 238, 497. 10 M. R. 77.
Wood v. Richardson, 102. 12 M. R. 121.
Woolever v. Knapp, 235.
Wooden Ware Co. v. U. S., 388.
Woolf v. Hamilton, 608.
Woodman v. Good, 367.
Woodruff v. North Bloomfield Co., 102.
Woods v. Freeman, 171.
Woodyear v. Schæfer, 93.
Wren v. Kirton, 623. 2 M. R. 408.
Wright v. Guier, 495.
Wright v. Moore, 699.
Wright v. Williams, 399.
Wyatt v. Harrison, 44.
Wynkoop v. Seal, 503. 13 M. R. 493.

Yahoola Co. v. Irby, 388. 14 M. R. 460.
Yandes v. Wright, 9. 14 M. R. 32.
Yarnall's Appeal, 587.
York, Mayor of, v. Pilkington, 99.
Young v. Clerk, 632.

Zeigler v. Fisher, 355.
Zeigler v. Zeigler, 231.
Zinc Co. v. Franklinite Co., 59.

TABLE OF HEADINGS.

PAGE

SURFACE SUPPORT (Continued)..... 1
TAILINGS..... 72
TAX..... 103
TENANT IN COMMON..... 221
TENANT FOR LIFE..... 358
TIMBER..... 371
TIME..... 389
TIN STREAMING..... 397
TRESPASS..... 403
TROVER..... 472
TRUSTS..... 522
TUNNELS..... 612
VENDOR AND PURCHASER..... 623

MINING REPORTS.

VOL. XIV.

HORNER ET AL. v. WATSON ET AL.

(79 Pennsylvania State, 242; 21 Amer. R. 55. Supreme Court, 1875.)

[1] **Mine carrying water from surface into another mine.** The owner of a coal mine in working it removed the ribs of coal which supported the roof, by reason whereof the surface sank and surface water flowed into the mine and thence into the mine of an adjoining owner. *Held*, that the former was liable to the latter for the damage, though he had worked according to the usage of miners and without negligence.

[2] **Custom to leave no support.** The mining right is servient to the surface to the extent of sufficient support, and a custom to remove the ribs, and allow the surface to sink, is not reasonable, nor of sufficient continuance to be good.

Destructive usage. A claim destructive of the subject of the grant can not be set up by any usage.

Error to the Court of Common Pleas of Allegheny County.

Actions on the case brought by Robert Watson and James Watson against Simpson Horner and John A. Wood. The parties were adjoining owners of coal mines. The cause of action in each, was the flooding the plaintiffs' mine with water, which, by the negligence of the defendants, was permitted to flow from their mine. The two actions were consolidated and tried as one.

James H. Hays was the owner of the surface land under which both mines were, and also of adjacent coal land.

On the 12th of August, 1853, Hays entered into an agreement with Simpson Horner and J. D. Hyatt (whose title the defendants have), by which Hays agreed to sell to them all the mineral coal comprising an area of 120 acres lying in and under a piece of land in Baldwin township, adjoining lands of

[1] See *Wilson* v. *Waddell*, 14 M. R. 25; *West Cumberland Co.* v. *Kenyon*, L. R., 6 Ch. Div. 773.

[2] *Smith* v. *Darby*, 13 M. R. 695; *Coleman* v. *Chadwick*, 14 M. R. 9.

Linhart's heirs on the south, and other lands of Hays on the east, north and west, with the right and privilege to Horner and Hyatt to enter "forthwith on the lands of Hays overlying and adjacent thereto, for the purposes of mining, excavating and removing said coal, and also a sufficient right of way * * * over and through the lands of said Hays on the lower side of Beck's run from the pit's mouth to the Monongahela river for the transportation of said coal," with privilege of a landing for twenty years, * * * also, the further privilege of driving and excavating such entries through the adjoining lands of the said Hays as may be required by them for ventilation and drainage of their pits and mines, without charge for the coal necessarily removed by them in the operation; the said Hays, however, reserving the like privileges of driving and excavating entries through the coal hereinbefore described of the said (Horner and Hyatt) for the like purposes for the use of his own mines upon the adjoining lands now owned by said Hays, and also the right of retaining such of the entries of (Horner and Hyatt) as he may desire to preserve, making, however, a ratable abatement for the amount of coal left for their support, and the amount removed by himself in the exercise of the privilege of driving the entries aforesaid through the coal of (Horner and Hyatt) from the purchase-money hereinafter stipulated to be paid, at the rate of $500 per acre for the amount thus retained." * * *

The defendants opened their mines in August or September, 1853.

On the 10th of September, 1856, Hays sold to the plaintiffs a piece of coal land adjoining that of the defendants on the westerly side.

The plaintiffs commenced to mine in March, 1857.

The case was tried, February 26, 1874, before STOWE, J.

The plaintiffs' evidence was that they continued to work at the mine until early in 1861, when, in consequence of the great depression of the coal trade, they ceased mining until the spring of 1863. The defendants also stopped mining, but began three or four months before the plaintiffs. There was no trouble to the plaintiffs' mine about water until the year 1864, when the water came in from defendants' mine so as to interfere with plaintiffs' work in their mines, and continued

increasing; plaintiffs procured a steam pump, which for some time relieved them; they agreed with defendants that the latter should pump the water, using plaintiffs' pumps; they neglected to pump and the water increased very much; when remonstrated with by plaintiffs, defendants refused to pump any more, saying that the coming in of the water was the act of God; plaintiffs afterward made a drain, at great expense, to Beck's run. There was evidence further that the defendants had been taking down the "ribs" or pillars composed of coal; that in consequence the superincumbent surface sank and cracked; that the rain, melted snow, etc., ran through the breaks in the surface into the defendants' mine, and thence in great quantities into the plaintiffs' mines, which were lower than the defendants'. The plaintiffs gave evidence also of the expense to which they were put in freeing their mines from the water.

The defendants gave evidence that quantities of water would collect in all coal mines from the working of them, especially where there were veins of clay through the coal, as frequently was the case. They gave evidence also, for the purpose of showing that the water which flowed from their mines into the plaintiffs' was the result of the ordinary and proper working of their mines, and not the result of negligence or want of care. They gave evidence also that their mines were as well opened as any mines on the river; that it was proper mining, and the approved, established and customary manner of mining bituminous coal to take out the ribs or pillars without reference to its effect as to the sinking of the surface.

The verdict was for the plaintiffs for $7,100.

The defendants took a writ of error.

M. W. ACHESON, for plaintiffs in error.—The plaintiffs should have left a sufficient rib of coal on the line between them and defendants which would have been effectual to prevent the water from coming in: Bainbridge on Mines, 455. An owner of a coal mine may work it as is most advantageous to himself, although the natural consequence may be some prejudice to the adjoining owner: *Smith* v. *Kenrick*, 7 M., G. & S. 515; Bainbridge on Mines, 460; *Acton* v. *Blundell*, 12 M. & W. 324; *Kauffman* v. *Griesemer*, 2 Casey, 407.

A. M. WATSON, for defendants in error, cited *Smith* v. *Kenrick; Acton* v. *Blundell, supra; Baird* v. *Williamson*, 109 Eng. Com. L. Rep. 388; *Jones* v. *Wagner*, 16 P. F. Smith, 429.

Mr. Justice GORDON delivered the opinion of the court.

The rights of both the plaintiffs and defendants, who hold adjacent coal fields, are derived from a common grantor, James H. Hays. The title of the defendants antedates that of the plaintiffs; hence it is not controverted but that any right or privilege, directly conferred by the deed or articles of Hays to the vendors of the former, or which, by necessary construction or implication, arises therefrom, must dominate any conflicting right or privilege found in the conveyance to the plaintiffs. They must take subject to the precedent grant. If, then, the defendants, Horner, Wood & Co., had the right under their contract to withdraw all the coal found within their grant, without leaving any ribs, pillars or other supports to sustain the surface, it is clear that the subsequent vendees of the adjoining tract took subject to such right, and of the consequent falling in of the superincumbent land, and the intrusion of surface water into their works, they can not complain. The whole question which we are required to consider, is raised from that part of the charge of the learned judge of the court below, wherein, after stating that the owner of a mine has a right to mine his coal in an ordinary way so long as that does no injury more than what necessarily arises from the removal of the coal, and that he would not be liable for the collection and flow, by reason of such mining, of subterranean water upon lower mines, he adds: "But otherwise where mining is done in such a manner (whether the ordinary way or not) as to introduce foreign water from the surface or higher land, by reason of the roof falling in, and thus introducing water from the surface which would not have flowed in if the roof of the mines had remained undisturbed and compact after the coal was removed." This was responsive to the defendants' second point, which was negatived, which required the court to charge that the defendants were not liable for the introduction of such surface water, if not occasioned by the willful and wanton acts of the defendants, but was a necessary

consequence of their mining according to the "approved, established and customary course and practice of mining in this region, and without any negligence in the operation of mining." The defendants thus endeavored to put themselves upon an alleged custom of the country which permitted the withdrawing of all the supporting ribs and pillars of a coal mine and the consequent subsidence of the soil. Now, though in our opinion the contract can not in itself be so construed as to warrant a withdrawal of all surface support, yet if the custom contend ed for be established, it follows that, in the absence of any provision to the contrary, it must govern and interpret the agreement of the parties, as it would be presumed they acted with reference to such custom in framing their compact. But the learned judge who tried this case in the common pleas, refused to recognize any such custom; in this we think he was right. This identical point was raised in the case of *Jones* v. *Wagner*, 16 P. F. Smith, 429, where it was held, that of common right the mining right was servient to the surface to the extent of sufficient supports to sustain it, and that there could be no custom to the contrary. The reason given for this conclusion was that the business of mining in the western part of the State was of a date too recent to give such a custom the age necessary for its validity. We are willing, however, to go one step further, and say that the alleged usage lacks another essential feature of a good custom, and that is reasonableness. It is not reasonable that that which the law grants as of common right should not merely be modified, but abrogated by custom or usage. When A grants to B a tract of land, reserving the minerals under it, the legal presumption is that B shall have and enjoy the exclusive and uninterrupted use of the surface; but if A may, notwithstanding, under the plea of some general custom, dig out the foundation of the land and let down the surface, or render it so dangerous that it can not be used, it is clear that he may thus destroy his own grant and invalidate the rights with which the law clothes his own vendee.

This court in *Jones* v. *Wagner*, adopted the English decisions upon this subject, and as these decisions embody an experience in the business of mining much greater than our own, they are entitled to the greatest respect. So, when we consider the super-eminent importance of this industry to the British Isles,

we may be sure that the judiciary thereof would not wittingly deprive it of any of its just rights or privileges. Turning then to these decisions, we everywhere find that the plea of a custom which would warrant the withdrawal of a proper support to surface land, is treated as unreasonable and invalid. And first, with reference to the construction of a contract such as that now under consideration, we have in the case of *Harris* v. *Ryding*, 5 M. & W. 60, a judicial exposition in point. In that case there was a grant of the surface with a reservation in the strongest possible terms of all and every part of the mines and minerals in the land. It was held, however, that the grantor could not withdraw all the coals without leaving a proper support for the surface; Baron Parke observing that by reasonable intendment, under the reservation, the grantor could only be entitled to so much of the mines below as would be consistent with the proper enjoyment of the surface. On the question of the validity of a custom tending to affect such intendment, we have first the case of *Hilton* v. *Lord Granville*, 5 Ad. & El. (N. S.) 701. The declaration was in case, charging that the defendant dug his mines so near the plaintiff's premises as to crack the ground, etc. The defendant pleaded a prescription to take the coals under any messuages, buildings or lands in the manor, and without liability for damages that might occur in consequence of the taking thereof. Held, that such a prescription was void because unreasonable, and that a custom similarly pleaded was void for the same reason; the objection being equally fatal to both. For a precedent for holding such custom bad, reference was had to the opinion of Willes, C. J., in *Broadbent* v. *Wilks*, Willes, 360, in which it is said that the true objection to the custom pleaded was that it was uncertain and unreasonable—as it might deprive the tenant of the whole benefit of his land. Lord Denman, C. J., adds, that a claim destructive of the subject-matter of the supposed grant can not be set up by any usage, "and that the prescription or custom here pleaded has this destructive effect and is so repugnant and void, appears to us too clear from the single statement to admit of illustration by argument." Not less destructive to the grantor's reserved rights would be the custom set up in the case in hand, for not only would it defeat any use which he might otherwise have of the reserved sur-

face, but by introducing surface water, would be destructive of his adjacent mines. The next case to which we make reference is that of *Humphries* v. *Brogden*, 12 Ad. & El. (N. S.) 739. The plaintiff charged in his *narr.* that the defendant carelessly, etc., and without leaving any pillars or supports, and contrary to the custom of the country in that behalf, so worked his mines as to crack open and to cause to subside the soil, etc. The plea was not guilty. The jury found the defendant had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports. A verdict was entered for the plaintiff for £110 damages, with leave to move to enter a verdict for the defendant if the court should be of the opinion that, under these circumstances, the action was not maintainable. Held, the plaintiff was, on this finding, entitled to judgment; for that of common right, the owner of the surface is entitled to support from the subjacent strata. In delivering the opinion of the court, Lord Campbell, C. J., says that if the owner of two adjacent closes should alien one of them, his alienee, without a grant to that effect, is entitled to lateral support *eo instanti* the deed is executed as much as after twenty years or any longer period, and that *pari ratione*, where there are separate freeholds of the surface land and the mineral, the former is entitled to support from the subjacent strata. For if this be not so the surface can not be securely enjoyed as property—and that circumstances are conceivable, as the great thickness of the minerals and their proximity to the surface—under which it would be rendered wholly worthless. He then comes to the conclusion that the rule, giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant must be laid down generally without reference to the nature of the strata or the difficulty of propping up the surface or the comparative value of surface and mineral. The learned justice further adds that he is not aware of any principle upon which qualifications could be added to the rule, and that an attempt to introduce them would lead to uncertainty and litigation. The case of *Hilton* v. *Lord Granville* was cited and approved as sustaining the doctrine that the custom therein contended for was void because unreasonable. The last case we have upon this subject is that of *Blackett* v. *Bradley*, 1 B. & S. 940.

In answer to the charge that they had wrongfully and without leaving proper supports, so worked their mines under the plaintiff's land as to cause it to fall in, the defendants pleaded title to the mines, under the said land, by virtue of the Inclosure Act, and, further, that from time immemorial up to the framing of said act, the lord of the manor and his assigns had been used and accustomed, as of right, to search for, win and work the mines under the commons without leaving any support for the lands under which the said were situate, etc., and that from the time of the passing of the act the mines had been so worked without leaving any support, and that the defendants worked the mines under a lease thereof from the lord. On demurrer, it was held that the plea was bad; such a prescription having been held invalid in *Hilton* v. *Granville*, 5 Q. B. 701. Wightman, J., said during the argument of the demurrer to the fourth plea, which was framed under the Act of 2 & 3 W. 4, Ch. 71, shortening the period of prescription: "If the custom is bad it can not be made better under Lord Tenterden's Act." The whole case was finally disposed of on the authority of the case last above cited; Cockburn, C. J., remarking, that though some of the reasoning in that case had been overruled in the House of Lords in *Rowbotham* v. *Wilson*, yet the decision itself remained unaffected.

These authorities, then, teach us that in whatever shape the plea for destruction of the surface right may come, whether as a prescription or custom, it is bad as tending to defeat the original grant. A distinction has been attempted between a grant of the surface by the owner of the whole fee, and a reservation thereof in his own favor as implied from the conveyance of the minerals alone. But this distinction is not sound. The right of support is *ex jure naturæ*, hence, as no doubt can arise as to its character, it can not come within the category of those ambiguities which must be construed most favorably for the grantee and most strongly against the grantor. So the very point is met in *Jones* v. *Wagner*, by a citation from Rogers on Mining, p. 455, where it is said: "If an owner of lands grant a lease of the minerals beneath the surface with a power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface."

In conclusion we may say that we have carefully examined the article of agreement between James H. Hays and Horner and Hyatt, and find nothing therein contained which would take them out of the rule above stated, and that on the whole case we consider the rulings in the court below unexceptionable.

The judgment is affirmed.

WILLIAMS and MERCUR, JJ., dissent.

COLEMAN ET AL. v. CHADWICK.

CHADWICK v. COLEMAN ET AL.

(80 Pennsylvania State, 81; 21 Amer. R. 93. Supreme Court, 1876.)

Natural right. Of natural right the surface land is entitled to support from the strata below.

[1] **Support at expense of the mineral.** When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface.

Custom to let down. A custom contrary to such right would not be reasonable and therefore would be invalid.

Implied reservation of support. A grant of minerals and all privileges necessary for the convenient working, etc., of coal, and the rights "incident or usually appurtenant to working and using coal mines," does not affect the grantor's right to surface support.

[2] **Springs tapped.** The loss of springs to the owner of the surface by reason of the ordinary working of the mines, does not render the owner of the minerals liable for damages.

Writs of error to the District Court of Allegheny County.

Action on the case commenced April 19, 1872, by James M. Chadwick against William Coleman, Frank Rahm, John S. Slagle and William Varnum, partners, trading as Coleman, Rahm & Co.

The plaintiff declared that he was the owner of a tract of sixteen acres of land in Penn township, Allegheny county, on which he, with his family, resided; that the defend-

[1] Followed, *Yandes* v. *Wright*, 14 M. R. 36.

[2] *Trout* v. *McDonald*, 9 M. R. 32.

ants were possessed of a coal mine underlying the said tract of land; that it was their duty in working the mine to leave sufficient pillars, ribs, supports, etc., so as to prevent the superincumbent surface of the said tract from falling in, or to have set up sufficient posts to support and protect the surface and prevent it from falling in; that the defendants mined the coal in so unskillful, negligent and careless a manner as to cause the surface of the tract overlying the mine "to cave in, crack, break and thereby destroy the buildings, orchards, springs of water, etc., and diverted the springs and streams of water from their natural channel, etc., so that the plaintiff was not only disturbed in his possession, use, etc., of the tract, but injured in his occupation as farmer and fruit-raiser."

The second count averred that the defendants took away the coal, without leaving proper ribs and supports or putting up the necessary posts for support; that in consequence the surface fell down, making cracks in plaintiff's land, and injuring his dwelling-house, his fences, fruit trees, etc., and diverting the springs from their natural channel.

The tract of land, surface and minerals beneath, on the 4th of October, 1853, belonged to Thomas Chadwick, who, on that day, conveyed to the firm of Coleman, Hailman & Co., "all the bituminous and fossil coal within and underlying" the tract in question; "containing an area of coal of 40 acres and 145 perches, with the privilege of entering on and occupying so much of the overlying land as might be necessary for opening mines, adits, drains, etc., and for constructing ways, roads, etc., and all the privileges necessary for the convenient working, transportation, etc., of the coal, etc., and "all rights and privileges incident or usually appurtenant to the working and using of coal mines." The rights of the grantees under the foregoing conveyance were afterward vested in the defendants. After the death of Thomas Chadwick, by proceedings in partition of his estate, the plaintiff, as one of his sons and devisees, became the owner of the part of the tract, the injury to which part is complained of in this suit.

The plaintiff's evidence tended to support the declaration. The defendants offered evidence that at the date of the conveyance and prior thereto, it was universally approved, established and customary course and practice of coal mining in the vicinity of plaintiff's land, to mine and remove all coal without

leaving ribs or other support for the surface; and that defendants had mined in accordance with this custom, and that it was impossible to mine there without interfering and causing a subsidence of the surface.

The jury found a verdict of $1,700 for the plaintiff, of which $1,000 was for loss of springs; but if the court in banc thought such loss ought not to be allowed, then plaintiff was to have $700.

Each party took a writ of error.

J. FITZSIMMONS, for plaintiff below.—If an owner of the whole estate have alienated the minerals, reserving the surface, he is not presumed to have parted with the right to the support of the surface: Bainbridge on Mines, 380; *Jones* v. *Wagner*, 16 P. F. Smith, 429; *Dugdale* v. *Robertson*, 3 Kay & J. 695; *Humphries* v. *Brogden*, 1 Eng. L. & Eq. 241; *Wakefield* v. *Buccleuch*, Law Rep., 4 Eq. 613; *Glasgow* v. *Hurlet Alum Co.*, 8 Eng. Law & Eq. 13. Where general words in a contract follow particular recitals, they are to be construed as applicable to subjects *ejusdem generis:* Parsons on Contracts, 501, note *u*, 500, note *r*. The right of support to the surface can not be taken away by words of doubtful meaning: Bainbridge on Mines, 433; *Proud* v. *Bates*, 5 Am. Law Reg. (N. S.) 171; *Shaw* v. *Stenton*, 28 L. J. Exch. 253. Where a particular clause in a deed granting certain rights respecting persons or things of an inferior class is followed by a general clause, such clause will not grant rights to persons or things of a superior class: *Doe* v. *Meyrick*, 2 Crompt. & J. 223; *Jackson* v. *Stevens*, 16 Johns. 110; *Queen* v. *Nevill*, 8 Q. B. 452. Springs of water can not be dissevered from the soil; all are considered real estate: 1 Co. Litt. 3 b, 4 a, § 1; *Caldwell* v. *Fulton*, 7 Casey, 483. The defendants had no right to disturb plaintiff's right to his flow of water: *Acton* v. *Blundell*, 12 M. & W. 336; *N. A. Railroad* v. *Peterson*, 14 Ind. 112; Washburn on Easements, §§ 365, 378, 450, 456, 460; *Smith* v. *Kenrick*, 7 C. B. 515. Each contiguous proprietor has absolute control of the water within his own premises: *Wheatley* v. *Baugh*, 1 Casey, 533; *Dexter* v. *Providence Co.*, 1 Story, 387; 2 Hilliard on Real Prop. 105; *Hill* v. *Newman*, 5 Cal. 445. A subterranean spring can not be diverted by the owner of the land above, to the injury of those using the water: *Smith* v.

Adams, 6 Paige, 435; *Balson* v. *Benstead*, 1 Campbell, 463; *Whitehead* v. *Parks*, 2 Hurlst. & N. 870. A spring is a water-course which, after leaving the opening, can not be diverted: *Gillett* v. *Johnston*, 30 Conn. 180.

M. W. ACHESON, for defendants below.—The deed from Chadwick was a sale of all the coal, and the right to mine it; by the contract the whole coal may be devoted without leaving support: *Jones* v. *Wagner*, 16 P. F. Smith, 429. Proof of usage is admissible to interpret a contract: 1 Greenl. Ev., §§ 292, 294; 2 Parsons on Contr., 49; *Dwight* v. *Whitney*, 15 Pick. 179; *Stultz* v. *Dickey*, 5 Binn. 286; *Aughinbaugh* v. *Poppenheffer*, 5 P. F. Smith, 347; Taylor's Landl. and Ten., §§ 350, 538, 554; *Van Ness* v. *Pacard*, 2 Pet. 137; *McCullough* v. *Irvine*, 1 Harris, 438. As to the loss of springs, he cited *Wheatley* v. *Baugh*, 1 Casey, 528; *Whetstone* v. *Bowser*, 5 Id. 59; *Haldeman* v. *Bruckhart*, 9 Wright, 514; *Ballacorkish M. Co.* v. *Harrison*, L. R., 5 P. C. 49.

Mr. Justice GORDON delivered the opinion of the court, January 6, 1876.

We have held in the case of *Horner* v. *Watson*, 29 P. F Smith, 251, decided at the present term, approving *Jones* v. *Wagner*, 10 Id. 429, that of natural right the surface land is entitled to support from the strata below, and that when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil, and that the plea of a custom to the contrary could not be entertained, because such a custom would be unreasonable, and hence wanting in an element essential to its validity. To the opinion in that case we refer for the reasoning intended to sustain that conclusion. It is admitted, however, that, as a man may do what he pleases with his own, he may, by grant, part with the right of surface support, and it is contended that such is the purport of the deed of Thomas Chadwick and wife to Coleman, Hailman & Co. That part of the aforesaid deed, which is supposed to release such right, reads thus: "And all the privileges necessary for the convenient working, running and transportation of said coal, and disposition of excavated

matter, and also all rights and privileges incident or usually appurtenant to the working and using of coal mines." But we can not perceive that this grant in any way compromises the grantor's right of surface support. If, indeed, the destruction of the superincumbent estate be one of the privileges necessarily incident and appurtenant to coal mining, then the said indenture does convey the right contended for. As, however, we have just determined that such destruction of the surface is in no way incidental to such mining, we must necessarily refuse our assent to the construction contended for. It is in effect but another form of a plea of a general custom or usage permissive of the removal of all subjacent support. For it is argued, that when the vendor used the words "all rights and privileges incident or usually appurtenant to the working and using of coal mines," he did so in view of such custom, as above referred to, and that his covenant must be interpreted accordingly. The answer to all this is, that as no such custom could have existed, because of its unreasonableness, it could not have entered into the contract of the parties. Support is part and parcel of the reserved estate; it is of common right, and hence must pass, if at all, by express grant, and is not to be defeated by mere implication arising from language that does not import such an effect.

We think the whole question is determined in the negativing of the custom contended for, and hence the judgment of the district court must be sustained.

We also affirm the same judgment in the writ of error brought by James M. Chadwick.

So far as we can judge from the record presented to us, the loss of the plaintiff's springs was occasioned by the ordinary operation of mining, and would have occurred, though no part of the surface had been broken. Mining must interfere more or less with those subterranean streams and percolations of water which appear upon the surface as springs; to say that the owner of the substrata shall be accountable in damage for their disturbance, is to say that he shall have no use whatever of his minerals; for, without interfering to some extent with such waters, mining is impossible.

Judgment affirmed.

WILLIAMS and MERCUR, JJ., dissented.

CORPORATION OF BIRMINGHAM v. ALLEN.

(L. R., 6 Ch. Div. 284. High Court of Chancery, 1876.)

Subsidence of land aided by excavations on intervening land. Between the land of the plaintiffs and that of the defendants, who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was, that when the defendants worked the coal under their land, subsidence was caused in the surface of the plaintiffs' land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings: *Held* (affirming the decision of the Master of the Rolls), that the plaintiffs had no right of action against the defendants.

The support to which a land owner is entitled from the adjacent land is confined to such an extent of adjacent land as, in its natural undisturbed state, would be sufficient to afford the requisite support.

This was an action by the Corporation of Birmingham, who were the owners of gasworks called the Swan Village Gasworks, to restrain the defendants, T. H. Allen and T. E. Holden, who were proprietors of Swan Farm Colliery, in the neighborhood of the gasworks, from working their coal in such a manner as to cause subsidence of the surface of the plaintiffs' land.

The plaintiffs purchased the gasworks from the Birmingham and Staffordshire Gaslight Company in the year 1875.

The gas company purchased the land on which the works were erected, together with the minerals under the same, in the year 1824. They afterward purchased the minerals under various pieces of land adjoining their property, for the purpose of preventing the surface of their own land from being shaken or disturbed. Among others they purchased, in 1872, the minerals under a piece of land belonging to Messrs. Pershore & Gregory, which adjoined the western boundary of the gasworks. The defendants' colliery lay to the west of this piece of land, to which it adjoined, so that the piece of land lay between the properties of the plaintiffs and the defendants.

The seams of coal under the district were as follows:

The Brooch coal, 3 feet 9 inches thick, about 90 yards from the surface.

The Thick coal 28 feet 9 inches thick, about 156 yards from the surface.

The Heathen coal, 3 feet 6 inches thick, about 156 yards from the surface.

The New Mine coal, 5 feet 6 inches thick, about 185 yards from the surface.

The Thick coal under the piece of land purchased by the gas company in 1872 had been worked out more than thirty years before they purchased it, and the superincumbent earth was propped by pillars in the usual way.

The Thick coal under the gasworks had not been worked out when the company purchased the site in 1824; but in the year 1834 they granted the Thick coal under a small portion of the surface to Messrs. Bagnall & Haynes, who worked it out. Some of the area thus granted was exactly under the retorts of the gas company.

The defendants were now engaged in working the lowest vein, or New Mine coal, under their land. They worked from west to east, and in doing so approached within a few yards of the western boundary of land purchased by the gas company in 1872.

The plaintiffs claimed that the working of the New Mine coal by the defendants had already caused a subsidence of the surface of their land and the buildings thereon erected, and would, if persisted in, cause them great injury, and they brought this action for an injunction accordingly.

The defendants pleaded that if any subsidence of the plaintiffs' land had taken place it had been caused partly by the excavations of Thick coal under the plaintiffs' own land by the lessees of the gas company, and partly by the erection of buildings within the last twenty years over such excavated portions; and they denied that they were under any liability to the plaintiffs in respect of any injury they had sustained.

Both sides went into evidence at great length. The trial came on before the Master of the Rolls on the 15th of March, 1877, and witnesses were examined on both sides.

The result of the evidence is stated in the judgment of the Master of the Rolls.

CHITTY, Q. C., and BEALE, for the plaintiffs.

SOUTHGATE, Q. C., INCE, Q. C., and SPEED, for the defendants.

JESSEL, M. R.

I am of opinion that the plaintiffs' case entirely fails. We have had a most careful, and, I think, a most exhaustive investigation into the facts, and, as far as I am concerned, I have no doubt upon any of the facts necessary to be decided.

I think it is plain that if the land adjoining the plaintiffs' land had not been undermined, the defendants might work the New Mine seam as well as the Thick coal seam up to their boundary. (His lordship then referred to the evidence on this point.)

Now, looking to this evidence, and considering that it is for the plaintiffs to prove their case, I am of opinion that it is proved satisfactorily that, supposing the land between the plaintiffs' and the defendants' land had remained in its natural state, if the defendants' workings should be prosecuted up to the boundary of their property, they would not, as far as the New Mine is concerned, cause any injury whatever to the plaintiffs' works.

Then there is a second question, which is a question of fact I think I ought to give my opinion upon. Has the working of the defendants' New Mine at all actually injured the plaintiffs' buildings? I am clear it has not. (His lordship then considered the evidence on this part of the case, and considered that there was no evidence of injury already received.)

Then comes the question, will it occasion injury? As to that, the evidence is very conflicting. Mr. Cooksey puts the safe distance as 100 yards, and although there is a little variation, the plaintiffs' experts substantially agree in putting the safe distance at 100 yards, or fifty-five yards from the defendants' boundary. The defendants' four experts also substantially agree, and they put it at sixty yards, or fifteen yards from the defendants' boundary.

Here, again, it is for the plaintiffs to make out their case, and it seems to me to be mere surmise on both sides. How-

ever, I must say, if it were necessary to decide the case on that ground, that it is not proved to my satisfaction that more than sixty yards is required, that is, more than fifteen yards from the boundary.

(His lordship, after considering certain subordinate questions of fact, continued:)

I now come to a point of very great difficulty indeed, on which the evidence is in a very singular condition. The plaintiffs themselves, or their predecessors in title, had allowed a portion of their land to be undermined, that is, had allowed coal to be extracted from under that land, and the question was, whether the extraction of that coal in any way interfered with the support of the retort houses. Now the odd part of the matter is, that the experts for the plaintiffs said that it would interfere with the support, and increase subsidence, and the experts of the defendants said it would not. Under these circumstances, I think it is only fair to say, that as against the plaintiffs, they can not reject the evidence of their own experts, and therefore I must consider that it does affect it to some extent; but, considering the evidence of the defendants' experts, not to a material extent. That is the way that matter appears to me.

Now, having so far dealt with the facts, let me consider the law. As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse* v. *Bonomi*, 9 H. L. C. 503, that every land owner in the kingdom has a right to support of his land in its natural state. It is not an easement; it is a right of property. That being so, if the plaintiffs' land had been in its natural state, no doubt the defendants must not do anything to let that land slip, or go down, or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt this court would interfere by injunction, on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened. Of course they must have a much clearer and much stronger case to call for the interference of this court by injunction where the damage is merely threatened and no damage has actually occurred, than when some damage has actually occurred, because

in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by. If some damage has occurred it makes it manifest and certain that further damage will occur by reason of the prosecution of the works.

Now, in this case, if it stands at all, it may well stand merely on opinion evidence, which would be sufficient ground for interference if all the experts agreed and the court were satisfied that damage had occurred; and I think when I compare the evidence of these various experts, I must take it for this purpose as proved, that if the defendants work within fifteen yards of their boundary, and in their New Mine coal, damage, and serious damage, will accrue to the plaintiffs' buildings. But the question I have to decide is whether, in law, that entitles them to an injunction. I think it does not. In this case it is true the plaintiffs or their predecessors acquired the mineral area, and acquired some of the land after the Thick coal had been worked out and not before; but for the present purpose I lay out of consideration the fact of their ownership of anything, and I will treat the case as if the portions under which they possess the minerals, and the land so subsequently acquired, did not belong to them, and it appears as the result of the evidence that if that Thick coal had not been extracted from under these portions of land, the intended operations of the defendants would certainly not cause any substantial injury.

But it is said that, inasmuch as these operations have occurred in what I will call the intervening land, and have thereby weakened the support, it will entitle the plaintiff to prevent the owners of the land on the other side of this intervening land, from working their mines in the way they could otherwise have worked them. But the first question one asks is, why? Why should the act of the intervening owner, that is, the owner of the intermediate land, deprive men of their rights to their mines? It strikes one at once as a most extraordinary proposition. The act of the intervening owner for this purpose, is rightful as regards the mine owners whose mines are asked to be confiscated, for that is what it comes to. If they can not work them they are confiscated. The plaintiffs ask for the confiscation of their property, not because they

have done any wrong, for they have done no wrong—not because the intervening owner has done any wrong, for he only worked his mines, and when he worked them he occasioned no injury to the person who owned the property on the other side; but it is said that inasmuch as he has taken out his coal first, the defendants are deprived of the right of getting their mines. I say it is a startling proposition, and one which appears to me so unfounded in reason, that I should be very loth indeed to believe it was founded in law. Now, what is the right of the adjoining owner? As I said before, it is to the support of his land in its natural state. Support by whom? The judges have said, "support by his neighbor." What does that mean? Who is his neighbor? It was contended that all the land owners in England, however distant, were neighbors for this purpose if their operations in any remote degree injured the land. But surely that can not be the meaning of it. The neighboring land owner to me, for this purpose, must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which, in its natural state, is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbor for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbor's land whose support you are entitled to. Beyond that it would appear to me you have no rights. Well, that being so, it is clear upon the evidence that the intervening portions of land between the boundary of the plaintiffs' and the boundary of the defendants' land was sufficient in its natural state for the support of the plaintiffs' building. Therefore, it appears to me that the plaintiffs have no rights as against the land owners on the other side of that intervening space, and that they acquire no rights, whatever the owner of the intervening land may have done; and, if the act of the intervening owner has been such as to take away the support to which the first land owner who com-

plains is entitled, then, for whatever damage occurs from the act which he has done, the first owner may have an action; but an action against the intervening owner, not an action against the owner on the other side; and it appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiffs' land, should have that liability thrown upon him without any default of his own, without any misconduct or any misfeasance on his part. I can not believe that any such law exists or ever will exist. It appears to me, therefore, that the plaintiffs are not entitled to damages for the acts of the defendants, and that the only order I ought to make is to dismiss the action with costs.

From this decision the plaintiffs appealed. It was admitted on the appeal that if the land lying between the plaintiffs' and defendants' land had remained in its natural condition, the present works of the defendants would not cause any injury to the surface of the plaintiffs' land; but that in its present condition the defendants could not work nearer than fifteen yards to their boundary without endangering the surface of the plaintiffs' land. It was also admitted that the support of the surface on which the retort houses were built was not appreciably diminished by the works of the plaintiffs' predecessors in title. The case came before the court of appeal on the 26th of June, 1877, where it was argued by the same counsel as below.

JAMES, L. J.—I am of opinion that the judgment of the Master of the Rolls ought to be affirmed. It has been conceded in the course of the argument that this is, at all events, in fact, whatever it is in principle, an extension of the liability of mine owners beyond anything for which there is an express authority in any decided case, that is to say, to a case in which the owner of the mines is not the adjoining owner *de facto* to the person whose property is alleged to have been injured; and it is also conceded for the purposes of the argument, and upon the facts of the case, that if the whole of the intervening land, to whomsoever it had belonged or may belong now, had been left in the state of nature, there would have been in that state of nature a sufficient support for the land of the plaintiffs so as

not to have imposed any burden upon the defendants, or to have caused what the Master of the Rolls has called a confiscation of the defendants' mineral property.

I agree with the Master of the Rolls that it seems a very startling thing to say that a man who has got a property in valuable mines can be deprived of those valuable mines because some one else between him and somebody else, a third person, has been doing something with his property. Whether you call it an easement or a natural right incident to property, or a right of property, it seems to me that those are only different modes of expressing the origin of the right, and do not express any difference in the right itself. Whatever it be, there must be, whether you use those terms or not, the idea and the substance of a dominant and servient tenement; and it does seem to me rather startling to find that the servient tenement can have its servitude or obligation increased by the act of the owner of the dominant tenement or by the act of a third person intervening between the owners of the dominant and servient tenements. In all the cases the terms "adjacent," "neighboring" and "neighbor" have been used, and I think that not immaterial. It has always been considered as the right of the adjacent owner, or the right of a subjacent owner; it has always been considered as the right of a man against his neighbor. Those are the terms which are always expressed in all the cases. As the Master of the Rolls in this case has pointed out, it does not necessarily apply to a case where the adjacent owner is the owner of a mere strip of land not affording support; and he has therefore endeavored to define, and I think he has succeeded in defining what adjacency and neighborhood mean in these cases. He has said, using a very felicitous expression, that that is the adjacent land, that is the neighboring property, which in extent would, in the natural state of things, have afforded the requisite support to the dominant tenement. I see no reason to dissent from that; there certainly is no authority which would entitle me to dissent from that proposition, and I can not, upon principle, find any reason for extending the liability to an owner of some land beyond the zone which is so described. It appears to me really that if that were not so, and if the thing were to be determined exactly as the thing stands, that the moment the alleged dam-

age is done, or the alleged damage is apprehended, there is no distinction in principle whether the intermediate acts which have changed the natural position of the properties are due to the plaintiff himself or to somebody else, because if he has lawfully worked his mines, he would say, "I have done no wrong; I have done nothing that I was not lawfully entitled to do. I have worked out my mines under my own land as far as I might lawfully do so, and having done that I have now a cavity under my land, and I now warn you, my neighbor, that you must not follow my example and work your mines, because if you work your mines in addition to my working my mines, you will let down my house or the surface from which I have removed my support—" thus throwing it entirely upon him. It seems to me that would be included in the result if it were to be tried at the time the thing was done; and that is exactly what we have authority against. Because in the case in the Court of Exchequer, *Partridge* v. *Scott*, 3 M. & W. 220, as it appears to me, we have a direct authority for saying that where a man has himself diminished the subjacent support of his own land, he has no right of action or complaint against his neighbor whose acts, by reason of that previous weakening, have caused subsidence of the plaintiff's soil. That we have authority for. Upon the same principle, it appears to me to follow, as I have pointed out, that if somebody, not the plaintiff or the defendant, has intervened and destroyed that which was the natural and legitimate support of the plaintiff's property, that is to say, that portion of the neighboring land which in a state of nature did exist for the purposes of support, no further consequence would arise to the prejudice of the owner of the further piece of land than would have arisen in the case of the plaintiff doing it himself.

I am of opinion, therefore, that the Master of the Rolls' judgment is right, and must be sustained, and that the appeal must be dismissed with costs.

BAGGALLAY, L. J.—This appeal has been argued, and I think it has been conveniently argued upon certain admissions or assumptions which limit the scope of the pleadings. According to the pleadings, the plaintiffs' land consists of five several properties adjacent to each other, colored with five different colors, which need not be particularly specified, and an injunction is

asked to restrain working by the defendants in such a way as to injure, by subsidence or otherwise, any portion of those five several lands; but the question has now been limited to the consideration of the land on which the retort houses are erected. It has been agreed also that certain conclusions which the Master of the Rolls arrived at upon the facts of the case shall, for the purpose of the argument, be treated as established. One of those conclusions of fact was that if the land intervening between the plaintiffs' land in question and the land of the defendants' had remained in its natural state, the defendants might have worked up to their boundary without doing any injury at all to the land. Another of the conclusions of fact was, that assuming the lands to be as they are at present, then the defendants can not work nearer than within fifteen yards of the mineral boundary between the two properties without causing serious damage to the plaintiffs' buildings; and a third admission is this—and I think it is an important one—that the support of the retort houses has not been in any way appreciably diminished by the working of the plaintiffs themselves under the land on which they are erected.

In this view of the case the suggested injury is, that by the working of the coal measures of the defendants, and by means of the primary subsidence or falling in of the lands between the defendants' land and the plaintiffs' land, which lands are also, for the purpose of argument, assumed to have belonged to third parties, injury will be occasioned also to the plaintiffs' land. Now it appears to me that when once you have arrived at the conclusions and admissions of fact to which I have just alluded, you have a case on which there can be no possible question. It seems to me to be quite contrary to all principle and authority to say that, by reason of the working by the defendants upon lands which are not adjoining lands to the land of the plaintiffs, and which, if the intermediate lands had remained in their natural state, would not have afforded support to the plaintiffs' land, there can be a right of action against the defendants. It appears to me that in the various cases, and they were all cited, I think, and discussed in the case of *Bower* v. *Peate*, 1 Q. B. D. 321, the very essence of the thing is that the land should be adjacent; that is, adjacent in the sense defined by the Master of the Rolls.

BRETT, L. J.—It appears to me strange, but I believe it to be the truth, that there is no authority on the particular point that we have to determine, and that it has therefore to be determined for the first time in this case. I assume, for the purpose of this case, that the land lying intermediate between the defendants' land and that which the plaintiffs desire to protect, is in the hands of other persons than the plaintiffs or the defendants, and I assume that if the defendants work under their own lands they will cause damage to the plaintiffs' lands, and I further assume that if the defendants should not work under their land that no damage will occur to the plaintiffs' land; so that in one sense it will be the act of the defendants which will cause the damage to the plaintiffs' land. But then, as against that, I take the finding to be—that if there had been no working under the intermediate land, working under the defendants' land would not damage the plaintiffs' land—and it is upon that last finding that I think this case must be determined; because upon that last finding the defendants' land is brought within this proposition, that it is land which, in its natural state, and in the natural state of the plaintiffs' land and of the intermediate land, would not be necessary as a support to the plaintiffs' land at all. It seems to me to follow from that, that if the defendants worked in their own land up to the boundary when there were no workings in either the plaintiffs' land or the intermediate land, their workings would have no effect whatever upon the plaintiffs' land. They would have a perfect right, therefore, under these circumstances, to work up to the limit of their own land. Then can that right of theirs which they have under those circumstances be diminished by any act done either by the plaintiffs or by any one for whose acts the defendants are not otherwise responsible? It seems to me that their right can not be so diminished. As for their right being diminished by any act of the plaintiffs themselves, I think the reasoning of Baron Alderson in *Partridge* v. *Scott*, 3 M. & W. 220, is conclusive to show that the defendants' right could not be diminished under such circumstances by reason of anything done by the plaintiffs themselves on their own land. Well, if that be the case with regard to the plaintiffs, and we have authority so far, we have only to go the additional step of saying that the defendants'

right shall not be diminished by the act of the intermediate owner—that is, the act of a person for whose action they are otherwise not at all responsible. They could not prevent that owner working in any way he pleased; they had no remedy against him for working in any way he pleased, and therefore, according to the ordinary principles of law, it seems to me their right ought not to be diminished by the acts of that person.

These are the reasons why I think the Master of the Rolls' proposition is a correct one, namely, that the only acts of the defendants in mining for which they can be responsible with regard to adjacent and neighboring owners are works under land which, if it remained in its natural state, and the other lands remained in their natural state, would be a support to the land of the person complaining.

I can hardly think that this is a relation of dominant and servient tenements, and would rather, for myself, put it that this is a relation between adjacent owners, which has an attribute which is the same as that which exists in the case of the relation between dominant and servient tenements, and that relation with regard to the reciprocal acts of the parties leads one to the same conclusion as that which we have already arrived at; although, therefore, this is a case of first impression, that is to say, a case in which we have, after the Master of the Rolls, for the first time to decide what is the proper definition of "adjacent lands," I think the Master of the Rolls has given a very happy definition of it, and one which we ought to accept.

WILSON ET AL., Appellants, v. WADDELL, Respondent.

(L. R., 2 Appeal Cases, 95. House of Lords, 1876.)

Right to exhaust minerals. The right to work mines is a right of property, which, when duly exercised, begets no responsibility. The owner of minerals has a right to take away the whole of them in his land, according to the natural course of user.

Subsidence of surface—Injuries by consequent waterflow. Where mineral workings have caused a subsidence of the surface, and a conse-

quent flow of rainfall, into an adjacent lower coal-field, the injuries being entirely from gravitation and percolation, are not a valid ground for any claim of damages. [1]

[1] **Obligation to restore the surface.** Where there is an agreement between the owner and his tenant that, when the mines are worked out, the surface shall be restored, the owner may complain, if it be not restored; but that gives no claim to any one else.

The contest in this case was between the lessees of two adjoining coal-fields in Lanarkshire, both lessees holding under the same landlord, Mr. Houldsworth, of Coltness, who took no part in the litigation. The above appellants brought their action to prevent the flow of surface water from the respondent's upper coal-field, coming on the appellants' lower coal-field, and doing serious damage, in respect of which the appellants claimed £2,000 as reparation; and they also sought an order requiring the respondent to execute certain works to prevent future inroads of water.

The defense of the respondent was, that his operations had been conducted in the ordinary mode, with due and reasonable care, and that the influx of water complained of, was, by natural gravitation, added to by appellants' own operations.

On the 6th of July, 1875, the Lord Ordinary (Lord Currie-hill) assoilzied the respondent from the conclusions of the summons, holding that he had done everything that he was bound to do, and even more, to prevent the mischief complained of. The Inner House (Second Division) adhered to the Lord Ordinary's interlocutor (4th series, Vol. 3, p. 288), awarding costs against the appellants; who thereupon appealed to the House, contending that the respondent's operations were not of a reasonable and proper character, and that the appellants having suffered therefrom, were entitled to the remedies which they sought.

Mr. COTTON, Q. C., and Mr. LEE (of the Scotch Bar), were heard for the appellants, and Mr. BENJAMIN, Q. C., and Mr. BALFOUR (of the Scotch Bar), appeared for the respondents, but were not called upon, the consideration of the case being adjourned from the 23d of November to the 1st of December, when the following opinion was delivered by Lord Blackburn,

[1] *Flint* v. *Brandon*, 13 M. R. 308.

stating the facts which gave rise to the action and the proceedings in the court below, as well as the reasons for the final judgment which was ultimately pronounced by the House.

LORD BLACKBURN.

My lords, in this case, the Lord Ordinary decided in favor of the defender, on the ground that the evidence did not show that the defender had done anything wrong, as against the pursuers. The Second Division of the Court of Session affirmed this judgment, Lord Gifford, agreeing with the reason of the Lord Ordinary, but Lord Ormidale and the Lord Justice Clerk intimating that they were disposed to hold, on the evidence, that the defender had so acted as to make himself liable for the damage sustained by the pursuers, had it not been for the pursuer's own acts, which their lordships thought to have been of such a description as to bar and preclude their claim for reparation.

Your lordships, on the 23d of November, heard the counsel for the appellants, who argued the whole case fully and ably, maintaining, first, that the conduct of the defender was such as to make him liable to the pursuers for the damage; and secondly, that the ground on which Lord Ormidale and the Lord Justice Clerk based their judgment, could not be supported, as the pursuers had done nothing to preclude their claim to reparation.

Your lordships have not thought it necessary to hear the counsel for the respondent, who might have furnished arguments to show that this second point furnished a good defense. It would not, therefore, be proper to say more than that, if it had been necessary to decide this point, the counsel for the respondent would have been called upon to argue in support of the ground on which alone these two learned judges below based their judgment.

But, my lords, it is not necessary to decide anything on this point, if your lordships are satisfied that what is alleged and proved does not make defender liable to the pursuers. And after hearing the able arguments of the counsel, and carefully considering the judgment of Lord Ormidale, I think that what is alleged and proved does not establish such a lia-

bility, and I believe all the noble and learned lords who heard the case are of the same opinion.

I will now state the facts in the case, which are scarcely in dispute.

The pursuers and defender are both lessees, under the same landlord, Mr. Houldsworth, of the minerals under two adjacent portions of the Coltness Estate. The seam of coal called the Ell coal crops out to the surface in the defender's holding. It lies at a high inclination, dipping toward the pursuers' holding, and where it enters it, is at a depth of many fathoms below the surface, so that any water which fell on or percolated into the defender's holding would necessarily, by force of gravitation, descend to the pursuers' holding, unless stopped by the minerals or soil from doing so. The soil above this coal is stiff, and impervious to water, so that, whilst it was undisturbed, the greater part of the rainfall flowed away over the surface, very little of it filtering down to the seam, which was in consequence a very dry seam; the impervious strata above, whilst undisturbed, forming what may be called a roof, practically water-tight, over the coal. But the defender altered this state of things. He worked the Ell coal, carrying away the whole of it, and, as a necessary result, the surface sank. At the upper part, where the seam cropped out to the surface, the subsidence over a space of about five acres was so great that the surface sunk into sits, and cracked into open fissures, through which the rainfall on these five acres flowed freely down into the defender's workings, and the coal in those workings having been removed it flowed down toward the pursuers' holding. There is evidence that part of this water was removed before reaching the pursuers, but there seems no doubt that a considerable quantity of water which, whilst the roof remained in its original state, a water-tight roof, flowed away over the surface, did descend to the pursuers' mines, and put them to additional expense in pumping it out.

My lords, the question in the case seems to me to be whether this was *damnum absque injuria*, which the pursuers must protect themselves from in such way as they can; or whether the defender, when working the upper part of the mine, was under any obligation to the pursuers, as owners of the mine on the dip, to preserve or to restore the impervious

roof, which, whilst it existed, prevented a great part of the rainfall from descending.

I think it right to observe that it is not shown that any water goes down these cracks except the natural rainfall on the surface. Your lordships have not to consider what difference it might make if the bed of a natural stream had been tapped by the defender's operations, and you have no need to form or express any opinion on the points discussed in the recent cases of *Smith* v. *Fletcher*, Law Rep., 7 Ex. 305; 9 Ex. 64, and *Crompton* v. *Lea*, Law Rep., 19 Eq. 115.

I may also observe, that no point has been discussed at your lordships' bar as to any difference in favor of the defender, in consequence of his holding under the same landlord as the pursuers, and by a lease prior in point of time to the pursuers. The case has been argued, and I propose to consider it, as if the pursuers held under a different landlord, or were themselves the owners both of the soil and the minerals toward the dip. And in this view the question seems to be, whether there is any servitude on the owner of the upper mines for the benefit of the owner of the mines on the dip to preserve either the surface or the subjacent minerals as water-tight as the undisturbed state of the strata.

My lords, no authority has been cited either in a Scotch or an English court in favor of the doctrine that there is such a servitude.

The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and that a servitude to prevent such an user must be founded on something more than mere neighborhood. In *Rylands* v. *Fletcher*, Law Rep., 3 H. L. 338, in this House, the Lord Chancellor (Lord Cairns) thus expressed himself:

"The occupiers of a close might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if in what I may term the natural user of that land there had been any accumulation

of water either on the surface or underground, and if, by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendant's in order to have prevented that operation of the laws of nature. As an illustration of that principle I may refer to a case which was cited in the argument before your lordships, the case of *Smith* v. *Kenrick*, in the court of common pleas."

I think it unnecessary to cite other authorities, as this is not only one of the most recent, but is also in this House. And I do not understand Lord Ormidale to express any dissent from this doctrine, but to proceed on a ground which I will mention presently. I may observe, however, that I can not see any principle on which an obligation for the benefit of the owners of the coal on one dip to restore the surface to its natural state of water-tightness can be founded, which would not equally give rise to an obligation to make the underground workings as water-tight as they were before the coal was removed; nor can I see any distinction between the rain-water falling on the surface and that which filtered down into the coal seams. Lord Ormidale, however, does make a distinction; he says:

"The water was not the natural product of and did not arise in the defender's mine, but was foreign water, so to speak, introduced into his mine from the surface, through operations of the defender, carried on in an unusual, unreasonable and improper manner." 4th Series, Vol. 3, pp. 298, 299.

My lords, the evidence was that the coal at the upper part of the seam could not in any way be removed without breaking the surface in the way in which it was broken, and that this was the usual and proper course of working such coal.

But there was some evidence which led Lord Ormidale to the conclusion that, though the defender was perfectly justified in causing the holes and sits, yet "in not filling up or securing the sits or holes his operations were not usual, reasonable, or proper."

There is no doubt that if a duty was cast on the defender to fill up or secure these holes and sits he has neglected it.

My lords, I do not stop to inquire how far the practice of miners could cast an obligation on the owner of the upper mine which would not otherwise exist, but it is unnecessary to determine anything on this point, as I think your lordships will agree with me in thinking that the evidence goes no further than to show that generally the owner of the surface made it a matter of bargain for the benefit of the surface that when mines are worked out the surface should be restored. Where such a stipulation exists, the owner or occupier of the surface has a right to complain if it be not restored, but that gives no claim to any one else. And in the present case the owner of the surface preferred that it should remain unrestored.

I for these reasons am of opinion that the judgment complained of should be affirmed, and that the appeal should be dismissed with costs.

The Lord Chancellor (LORD CAIRNS):

My lords, at the close of the argument of the appellants in this case, your lordships intimated that you would consider whether you would desire to hear the respondents. The result of that consideration has been that there is no doubt in the mind of any of your lordships as to the course which should be taken with regard to this appeal. I have had the advantage of considering the observations which have just been made by my noble and learned friend; and I have only to say that I entirely agree in the course which he has proposed.

LORD PENZANCE.—My lords, I will only say that I entirely concur with the opinions which have been expressed.

LORD GORDON.—My lords, I also entirely concur.

Interlocutors complained of affirmed, and appeal dismissed with costs.

YANDES ET AL. v. WRIGHT.

(66 Indiana, 319; 32 Amer. R. 109. Supreme Court, 1879.)

Mine subject to servitude of support. The grantee of minerals takes his right under the servitude that he will support the surface above his mine, and this servitude holds though it may not be possible to work the mine and yet leave a sufficient support.

[1] **Surface defined.** The term surface is held to include, not merely the geometrical surface, but as well all strata superincumbent upon the mineral strata granted.

Upper seam entitled to support from lower. Where support is taken away an action lies; and in this case recovery by the owner of an upper coal seam against the owner of the lower seam was upheld.

Action of damages for destroying mine. The opinion states the case. The plaintiff had judgment below.

I. M. COMPTON, C. MATSON, S. W. CURTIS and HOLLIDAY, for appellants.

G. A. KNIGHT and C. H. KNIGHT, for appellee.

BIDDLE, J.

On the 21st day of October, 1864, David Cornwell, the lessor, granted to the appellee and George Elbreg "the sole right to dig, mine, use, or sell clay situate on the" land described in the lease ("except such clay as the first party may dig for potter's use"). Also the right to dig and mine coal on the same premises. Elbreg assigned his interest in the grant to the appellee, by which he holds the entire right under it.

On the 31st day of August, 1865, David Cornwell granted to Elbreg, Montgomery & Co. a right in the same lands "to have, hold and possess all the coal, iron, lead and other productions, whether of a vegetable or mineral origin, under the surface, except, however, all the clay and stone heretofore let to Wright & Elbreg." This grant was assigned by Elbreg, Montgomery & Co. to the appellants, thus giving them the

[1] *Pretty* v. *Solly*, 8 M. R. 301; *Marvin* v. *Brewster Co.*, 13 M. R. 40; *Richards* v. *Jenkins*, 18 Law Times, N. S. 438.

entire right to the things granted, subject to the grant before made to the appellee.

Each grant ran for the term of twenty-five years, and each party entered upon his premises, commenced and prosecuted his mining operations. The grant of the appellants lies about thirty feet below the grant of the appellee, in the direct line of gravitation.

The appellee, as plaintiff below, avers in his complaint that appellants, the defendants below, without any negligence on the part of the plaintiff, so negligently, carelessly and unskillfully located and insecurely constructed a certain entry or room underlying an entry made by plaintiff in said clay strata, and so carelessly managed and insecurely propped the same, as to cause by the said negligence, carelessness and unskilfulness, the intervening strata of rock, slate and other substances to cave and fall in, and thereby destroy and render wholly useless one of the main entrances constructed by plaintiffs, leading into said strata and veins. By reason of which, etc. Wherefore, etc.

The complaint was tested by a demurrer, alleging the insufficiency of the facts as grounds of recovery—and held by the court to be sufficient.

Answer, general denial. Trial by jury, and verdict for appellee. Judgment on verdict, over a motion for a new trial and exception. Appeal.

The appellants present three questions for our consideration, in their brief. 1. The sufficiency of the complaint; 2. The propriety of the instructions; and, 3. The sufficiency of the evidence to sustain the verdict.

1. The complaint is sufficient, whether the law is as claimed by the appellants or as claimed by the appellee. Indeed this point may be held as waived in the brief of the appellants.

2. The instructions. It is contended by the appellants, that if the owner of the lower mines removed his minerals in the usual and proper course of mining, without negligence or wrong on his part, in leaving the proper supports for the upper mine, he will not be liable for damages caused by the natural effect of the laws of gravitation.

The appellee insists that if the owner of the lower mine, in removing his minerals, so weakened the support of the surface in its natural condition as to cause its subsidence, and

thereby injure the upper mine, he will be liable for all damages that ensue therefrom; and that no degree of care, skill or diligence, exercised in his mining operations, will excuse him from such liability.

We need not set out the instructions complained of, for it is plain that if the appellants are right in their view of the law, the instructions given were erroneous, and those refused correct; but if the appellee is right in what he claims to be the law, then the instructions given were proper, and those refused erroneous.

This question is carefully examined and decided in the case of *Humphries* v. *Brogden*, 12 Q. B. 739.

In that case "It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently, or contrary to the custom of the country. The jury found that the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports; and a verdict was entered for the plaintiff for one hundred and ten pounds damages, with leave to enter a verdict for the defendant, if the court should be of opinion that under the circumstances the action was not maintainable."

Lord Campbell, C. J., in delivering the opinion of the court, says: "We have attempted without success to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of servitudes is so copiously and discriminately treated, probably proceeds from the subdivisions of the surface of the land and the minerals under it into separate holdings, being peculiar to England." But his lordship cites and analyzes a number of authorities which, more or less directly support his opinion. He concludes by quoting the following extract from Erskine's Institute of the law of Scotland, Book II, title 9, § 11, and note: "Where a house is divided into different floors or

stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound merely by the nature and condition of his property, without any * * * servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." His lordship then sums up the case in the following words: "For these reasons we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines, and that the rule to enter a verdict for the defendant must be discharged."

We have found some English authorities besides those cited by Lord Chief Justice Campbell, in *Humphries* v. *Brogden*, *supra*, and some subsequently decided; and also some American authorities. The right of surface support is treated by Blanchard & Weeks' Leading Cases on Mines, etc., 616–619, wherein they lay down the common law rule, and refer to several authorities in support of it, in the following words: "There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words, showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise."

In Wood on Nuisances, § 194, the rule is expressed as follows: "When there is a simple conveyance of the surface, reserving the mines, with the right to enter upon the surface to work the same, and no express power given or reserved to reduce a subsidence of the surface, if necessary in the working of the mines, the person owning the minerals is bound, at his peril, not to cause a subsidence of the surface, even though he can not work his mines at all without doing so; and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of the subsidence thereof."

In deciding the case of *Jones* v. *Wagner*, 66 Penn. St. 429, 5 Am. Rep. 385, Thompson, C. J., said:

"The right of supports, *ex jure naturæ*, which the owner of the soil is entitled to receive from the minerals underneath, has, within comparatively a few years, received much attention in the courts in England, and the rule deducible from the cases in all the courts, the House of Lords, Exchequer and Queen's Bench, is, that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of sufficient supports to sustain the latter, or in default, there is a liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. * * *

"That if an owner of lands grant a lease of the minerals beneath the surface with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface, and so conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law, upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support."

"These citations prove two things, viz.: that the owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligence, and so may be declared upon."

In the case of *Coleman* v. *Chadwick*, 80 Penn. St. 81, it was held that, "when the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface."

The following authorities maintain the same principle: *Horner* v. *Watson*, 79 Penn. St. 242; 21 Am. Rep. 55; *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Wakefield* v. *Duke of Buccleuch*, L. R. 4 Eq. Cas. 613; *Harris* v. *Ryding*, 5 M. & W. 60; *Dugdale* v. *Robertson*, 3 Kay & J. 695; Bainbridge on Mines, 485.

It should be noticed throughout the cases above cited, that the word "surface" as used in the books, means not

merely the geometrical superficies without thickness, but includes whatever earth, soil or land lies above and superincumbent on the mine. Surface, therefore, includes the appellee's mine which lies above the appellants' mine and below the top surface, which still may remain undisturbed and uninjured in the original grantor: *Humphries* v. *Brogden*, *supra*. See also as to the meaning of the word "surface," 2 Abb. Law Dic., title Surface, and *Burkhardt* v. *Hanley*, 23 Ohio St. 558.

We have also carefully examined the cases cited by the appellants, and find none that conflicts with the above views They all touch mainly upon the rights in flowing water, used in mining, in which only a usufruct interest can be held, and which is very different from the permanent right which may be obtained in the solid surface superincumbent upon a mine. They are therefore, not in point.

3. As to the sufficiency of the evidence to sustain the verdict: When no more negligence need be proved than the failure to furnish supports for the superincumbent mine, we think it is abundant.

The judgment is affirmed at the costs of the appellants.

Judgment affirmed.

GILMORE v. DRISCOLL.

(122 Massachusetts, 199; 23 Amer. R. 312. Supreme Judicial Court, 1877.)

[1] **Right to support of soil, absolute; to support of improvements, dependent.** One who digs a pit on land so that, by the operation of natural and ordinary causes, which he takes no precautions to guard against, the land of another fall into the pit, is liable to an action by the latter for the injury to his land in its natural condition, but not for injuries to buildings or improvements thereon, such as fences and shrubbery, without proof of actual negligence.

Damages for removal of lateral support. The measure of damages is the actual loss of and injury to the soil; and it is immaterial that the defendant is not the owner of the land dug upon, but removes the soil therefrom for his own benefit by permission of the owner thereof.

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[1] *Hunt* v. *Peake*, 1 Johns. 705 (Eng.); see note to *Thurston* v. *Hancock*, 7 Am. Dec. 62; *Partridge* v. *Scott*, 13 M. R. 640.

Tort for injuries to the plaintiff's land by the excavation of adjoining land by the defendant.

The case was submitted to the superior court, and, after judgment for the plaintiff, to this court on appeal, on an agreed statement of facts as follows:

"The plaintiff was owner of a parcel of land in a populous portion of that part of Boston, lately Roxbury, as described in her writ, bounded on the southwesterly side by the land of one Webb. On this land of the plaintiff, but immediately adjoining the division line, was a fence, and near to it a few currant bushes and certain modern structures. The two parcels in their natural condition made a knoll, the highest part of which was at or near the division line.

"Webb, the owner of the adjoining lot, under an agreement with one Gilligan, gave him permission to remove the soil of his land down to a grade of the street on its northwesterly side, on which both lots were located. Webb gave Gilligan the right to go up to, but not within two feet of the plaintiff's fence. Webb had no other connection with the acts complained of.

"Gillighan, for a consideration, gave permission to the defendant to remove a portion of this said soil, and under that license the defendant removed all the soil that was removed nearest to and along the line of the plaintiff's land, and the removal of which, it was alleged, caused the damage complained of. Gillighan gave the license to the defendant under the same restrictions as to 'not within two feet of the plaintiff's fence," as Webb had imposed upon him.

"The depth to which the grade of this adjoining land was lowered by the defendant against the plaintiff's lot was at its greatest measure some ten feet, and at its lowest, some five feet. The soil of the plaintiff's lot fell along the whole length of her line to the width of some two or three feet at the top, taking with it the fence and shrubbery upon it. The weight of the plaintiff's structures near the line did not contribute to the falling away of the soil. The defendant left a bank of earth on the Webb lot against the plaintiff's land along the whole line, but it was not in all parts two feet wide at the top. There was no falling away of the soil at the time the defendant ceased his work, which was in the fall of the year, about

the 23d of October. The bank left by the defendant was rendered insufficient to hold the soil of the plaintiff in its natural condition by the effect of rains and frost. The bank began to give way under the effect of rains and frost at once, but the soil of the plaintiff was not actually disturbed till the month of March, in the spring following the fall when the work of the defendant was ended.

"The damages occasioned to the plaintiff by loss of and injury to her soil alone, caused by the acts of the defendant, amount to ninety-five dollars. To put the plaintiff's land into its former condition, and so maintain it by means of a retaining wall (which I find to be the best method of accomplishing that result), would cost the sum of five hundred and seventy-five dollars; and to replace the fence and shrubs would cost the further sum of forty-five dollars. The difference between the market value of the plaintiff's lot of land as affected by the act of the defendant, and what its market value would be, had it not been deprived of its natural supports (without taking into accounts the unavoidable disadvantage to the plaintiff which must have followed from the lawful cutting down of the adjoining lot, though her soil had not been disturbed thereby), would be the equivalent of, and fully compensated by the cost of putting her land back into the same condition it was before, or the sum of the two amounts last named, namely, six hundred and twenty dollars."

Upon the foregoing facts the court was to enter such judgment as it should deem proper.

P. E. TUCKER, for the plaintiff.

C. H. DREW, for the defendant.

GRAY, C. J.

The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor to have the earth stand and the water flow in its natural condition. In the case of running water, the owner of each estate by which it flows has only the right to the use of the water for reasonable purposes, qualified by a like right in every other owner of land above or below him on the same

stream. But in the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor, and if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him without proof of negligence.

But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterward make upon his own land in the exercise of his right.

In 2 Rol. Ab. 564, it is stated that in *Wilde* v. *Minsterley*, in 15 Car. 1, it was decided in the King's Bench, after a verdict for the plaintiff, that "if A be seized in fee of copyhold land next adjoining to the land of B, and A erects a new house upon his copyhold land, and some part of the house is erected upon the confines of his land next adjoining to the land of B, and B afterward digs his land so near to the foundation of A's house, but no part of A's land, that thereby the foundation of the house and the house itself fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near the land of B, for he, by his act, can not hinder B from making the best use of his own land that he can. But it seems that a man who has land next adjoining to my land can not dig his land so near my land that thereby my land shall go into his pit; and therefore, if the action had been brought for this, it would lie."

In the same court, in 15 Car. II, Justices Twisden and Windham said that it had been adjudged that, "if I, being seized of land, lease forty foot thereof to A to build a house thereon, and

other forty foot to B to build a house, and one of them builds a house, and then the other digs a cellar in his land, whereby the wall of the first house adjoining falls, no action lies for that, because each one may make the best advantage of his digging;" "but it seemed to them that the law is otherwise, if it was an ancient wall or house that falls by such digging." *Palmer* v. *Fleshees*, 1 Sid. 167. In another report, the corresponding statement is, that "it was adjudged that two having ground adjoining, the one built *de novo*, and the other in his ground digged so near that the other fell, and no remedy, the house being new." *Palmer* v. *Flessier*, 1 Keb. 625. That adjudication is referred to in Siderfin as "7 Jac. in Pigot and Sury's case," and in Keble as "7 Car." But *Sury* v. *Pigot*, decided in 1 Car. 1, and fully reported in Popham, 166, was upon another point, and is so stated in Keble, *ubi supra;* and it would seem that the reference intended may have been to the case of *Wilde* v. *Minsterley*, above cited.

There are, indeed, two or three early cases in which actions appear to have been sustained for undermining houses by digging on adjoining land: *Slingsby* v. *Barnard*, 14 Jac. 1, 1 Rol. 430; *Smith* v. *Martin*, (23 Car. II,) 2 Saund. 400; *Barwell* v. *Kensey*, (35 Car. II,) 3 Lev. 171; *S. C.*, 1 Mod. Entr. 195. But in *Slingsby* v. *Barnard* and in *Smith* v. *Martin*, the objections made were not to the right to maintain the action, but only to particulars in the form of the declaration; and in *Barnwell* v. *Kensey*, the declaration, as construed by the majority of the court, alleged not merely digging near the plaintiff's foundation but digging that foundation itself.

In *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1094, Lord Holt and Justice Powell are reported to have "held that a man can not build so near another man's house as to throw it down." But the only point adjudged was the same as in *Ball* v. *Nye*, 99 Mass. 582, that a man is bound, of common right, to keep a vault upon his own land in repair, so that the filth shall not flow upon his neighbor's land, "for he whose dirt it is must keep it that it may not trespass." *S. C.*, 1 Salk. 360, 361; 6 Mod. 311; 1 Salk. 21; Holt, 500. And upon a comparison of the various reports it is evident that the digging so near another's wall as to weaken it was not spoken of as giving a right of action to the owner of the wall, but as limiting his liability for the escape of filth caused by the new digging.

The latest and the most authoritative statement of the law of England upon this point before the American Revolution is that of Chief Baron Comyns, who, citing Rolle's Abridgment and Siderfin's Reports, *ubi supra*, says that an action upon the case lies for a nuisance, "if a man dig a pit in his land, so near that my land falls into the pit;" but does not lie, "if a man build an house, and make cellars upon his soil, whereby an house newly built in an adjoining soil falls down." Com. Dig. Action upon the Case for a Nuisance, A. C.

In *Thurston* v. *Hancock*, 12 Mass. 220, which was decided in 1815, and is the leading American case on this subject, the plaintiff, in 1802, bought a parcel of land upon Beacon Hill, in Boston, bounded on the west by land of the town of Boston; and in 1804 built a brick dwelling-house thereon, with its rear two feet from this boundary, and its foundation fifteen feet below the ancient surface of the land. The defendants in 1811 took a deed of the adjoining land from the town, and began to dig and remove the earth therefrom and, though notified by the plaintiff that his house was endangered, continued to do so to the depth of forty-five feet, and within six feet of the rear of the plaintiff's house, and thereby caused part of the earth on the surface of the plaintiff's land to fall away and slide upon the defendant's land, and rendered the foundations of the plaintiff's house insecure and the occupation thereof dangerous, so that he was obliged to abandon it.

The court, after advisement and upon a review of the earlier English authorities, held that the plaintiff could recover for the loss of or injury to the soil merely, and not for the damage to the house; and Chief Justice Parker, in delivering judgment, said: "It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas.*" "But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed

pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired." 12 Mass. 224. "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor." "The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him." "It is, in fact, *damnum absque injuria.*" 12 Mass. 229.

Upon the facts of that case, it was questionable whether the acts of the defendant would not have caused the falling away of the plaintiff's land if no house had been built thereon; and yet the court held the plaintiff not to be entitled to recover any damages for the fall of his house, without regard to the question whether the weight of the house did or did not contribute to the fall of his soil into the pit digged by the defendant. No claim for like damages was made in this commonwealth until more than forty years afterward, when the decision in *Thurston* v. *Hancock* was followed and confirmed: *Foley* v. *Wyeth*, 2 Allen, 131.

In *Foley* v. *Wyeth*, the court, after stating that the right of support from adjoining soil for land in its natural state stands on natural justice and is essential to the protection and enjoyment of property in the soil, and is a right of property which passes with the soil without any grant for the purpose, said: "It is a necessary consequence from this principle, that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation

of an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskilfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it." 2 Allen, 133. And it was accordingly adjudged that, if the defendant in that case, by excavating and carrying away earth on her own land, caused the plaintiff's land to fall and sink into the pit which she had dug, she was liable for the injury to the soil of the plaintiff; but that, in the absence of any proof of negligence in the execution of the work, the jury could not take into consideration, as an element of damage for which compensation could be recovered, the fact that the foundation of the plaintiff's house had been made to crack and settle, although the weight of his house did not contribute to the sliding or crumbling away of the soil.

The decisions in *Thurston* v. *Hancock*, and *Foley* v. *Wyeth* are not affected by those in *Hartshorn* v. *Worcester*, 113 Mass. 111, and *Marsden* v. *Cambridge*, 114 Mass. 490, which related to claims for injuries done in the making of a highway, and were based upon the terms of the statutes upon that subject, and not upon the rule of the common law governing proprietors of adjoining lands.

By the modern authorities in Great Britain, it is clear that a right to the support of a building by adjacent land can arise only by grant or prescription: *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Partridge* v. *Scott*, 3 M. & W. 220; *Caledonian Railway* v. *Sprot*, 2 Macq. 449; *Bonomi* v. *Backhouse*, E., B. & E. 622, and 9 H. L. Cas. 503.

In *Bonomi* v. *Backhouse*, in which an action was maintained by an owner of land and of an ancient house, for damage occurring within six years, from the working of coal mines, two hundred and eighty yards from the house, more than six years

before the commencement of the action, Mr. Justice Willes, delivering the judgment in the Exchequer Chamber, which was affirmed by the House of Lords, said: "The right to support of land and the right to support of buildings stand upon different footings, as to the mode of acquiring them; the former being *prima facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant; whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same." E. B. & E. 654, 655. And Lord Wensleydale said: "I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighboring property, not to interrupt that enjoyment." 9 H. L. Cas. 513.

The cases of *Brown* v. *Robins*, 4 H. & N. 186, *Hunt* v. *Peake*, H. R. V. Johns. 705, and *Stroyan* v. *Knowles*, 6 H. & N. 454, in which it was held that, in an action for causing soil to sink, which would have sunk if there had been no building upon it, the damages recovered might include the injury to the buildings also, are directly opposed to our own cases of *Thurston* v. *Hancock* and *Foley* v. *Wyeth*, in the latter of which *Brown* v. *Robins* was before the court.

Upon a question of this kind, affecting all the lands in the commonwealth, it would be unjustifiable and mischievous for the court to change a rule of law which has been established and acted upon here for sixty years. Even in England, it is held that for digging upon neighboring land, and thereby causing the plaintiff's land to sink and his building to fall, although the jury find that the land would have sunk if there had been no building upon it, yet no action will lie, if no appreciable damage is proved to the land without the building: *Smith* v. *Thackerah*, L. R., 1 C. P. 564.

The weight of American authority is in accordance with the decisions of this court. It has generally been considered that for an excavation causing an injury to the soil in its natural state, an action would lie; but that, without proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to

buildings by excavating adjoining land not previously built upon: *Panton* v. *Holland*, 17 Johns. 92; *Lasala* v. *Holbrook*, 4 Paige, 169; *Hay* v. *Cohoes Co.*, 2 N. Y. 159, 162; *McGuire* v. *Grant*, 1 Dutch. 356; *Richart* v. *Scott*, 7 Watts, 460; *Richardson* v. *Vermont Central Railroad*, 25 Vt. 465; *Beard* v. *Murphy*, 37 Vt. 99, 102; *Shrieve* v. *Stokes*, 8 B. Mon. 453; *Charless* v. *Rankin*, 22 Misso. 566.

It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former. The English cases are founded on an analogy to the doctrine of ancient lights, which is not in force in this country: *Hide* v. *Thornborough*, 2 Car. & K. 250, 255, and *Stansell* v. *Jollard*, there cited: *Solomon* v. *Vintners' Co.*, 4 H. & N. 585, 599, 602; *Chasemore* v. *Richards*, 7 H. L. Cas. 349, 385, 386; *Greenleaf* v. *Francis*, 18 Pick. 117, 122; *Keats* v. *Hugo*, 115 Mass. 204, 215; *Richart* v. *Scott*, 7 Watts, 460, 462; *Napier* v. *Bulwinkle*, 5 Rich. 311, 324. But this case does not require us to determine that question, because there is no evidence that the structures and improvements upon the plaintiff's land have been there for twenty years.

Nor is it necessary to consider whether negligence on the part of the defendant could enlarge the measure of his liability; because the case stated does not find that he was negligent, nor set out any fact from which actual negligence can be inferred. The cause of action is that the plaintiff has an absolute right to have her soil stand in its natural condition, and that any one who injures that right is a wrongdoer, independently of any question of negligence: *Foley* v. *Wyeth*, 2 Allen, 131, 133; *Hay* v. *Cohoes Co.*, 2 N. Y. 159, 162; *Richardson* v. *Vermont Central R. R.*, 25 Vt. 465, 471; *Humphries* v. *Brogden*, 12 Q. B. 739.

The fact that the defendant was not the owner of the adjoining land affords him no exemption. It was never considered necessary in an action of this kind, to allege that the defendant owned or occupied the land on which the digging

was done that injured the plaintiff's soil: *Smith* v. *Martin*, 2 Saund. 400 and note; *Nicklin* v. *Williams*, 10 Exch. 259. Even an agent of the owner of the adjoining land would be liable for his own negligence and positive wrongs; for his principal could not confer upon him any authority to commit a tort upon the property or the rights of another: *Bell* v. *Josselyn*, 3 Gray, 309; Story on Agency, § 311. And, upon the case stated, the defendant appears not to have been an agent of the owner of the land, but to have removed the soil therefrom for his own benefit, by permission of Gilligan, who had a like agreement with and license from the owner; and it is at least doubtful whether the owner of the land could be held responsible for the defendant's acts: *Gayford* v. *Nicholls*, 9 Ex. 702; *Hilliard* v. *Richardson*, 3 Gray, 349.

The case finds that the defendant ceased his work toward the end of October, and left the bank in such a shape that by the effect of rains and frost it was rendered insufficient to hold the soil of the plaintiff in its natural condition, and began to give way at once, although the plaintiff's soil was not actually disturbed till the month of March following. The necessary inference is that by the operation of natural and ordinary causes upon the land, as it was left by the excavations of the defendant, and which he took no precaution to guard against, part of the soil of the plaintiff's land slid and fell off; and for the injury so caused to her soil this action may be maintained. But she can not maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon.

The remaining question is of the measure of damages. The peculiar form of the case stated, in this respect, as might be inferred from its terms, and as was admitted at the argument, has been occasioned by incorporating into it the substance of the award of an arbitrator. It is agreed that the "damages occasioned to the plaintiff, by loss of and injury to her soil alone, caused by the acts of the defendant, amount to $95." We are of opinion that she is entitled to recover that sum, and no more. She is clearly not entitled to recover the cost of putting her land into and maintaining it in its former con-

dition, because that is no test of the amount of the injury. *McGuire* v. *Grant*, 1 Dutch. 356. She can not recover the difference in market value, because it does not appear that that difference is wholly due to the injury to her natural right in the land; it may depend upon the present shape of the lot, upon the improvements thereon or upon other artificial circumstances, which have nothing to do with the natural condition of the soil.

Judgment for the plaintiff for $95.

SCRANTON ET AL. v. PHILLIPS ET AL.

(94 Pennsylvania State, 15. Supreme Court, 1880.)

[1] **Reserve of mines without obligation to support surface.** Where one grants the surface of land and reserves the mines beneath, the implied right of support to the surface, which passes with the grant, may, by apt words in the deed, be excepted therefrom, and where such exception has been made, the grantor, or those who claim through him, may mine all the coal, even though by such mining the surface should fall in.

Exemption, by contract, from liability for caving. Where A sold land, reserving to himself "all the coal" therein and the right to mine the same by any subterranean process, but without the right to enter upon the surface, and in the contract of sale provided that he should be exempt from any liability for any injury resulting to the surface from the mining: *Held*, sufficient to exempt A and his assigns from liability for damages resulting from the caving in of the surface from mining.

Error to the Court of Common Pleas of Luzerne County.

Case by William J. Phillips and others, trustees of the Calvinistic Methodist Church of Hyde Park, against Seldon T. Scranton and others, heirs and legal representatives of George W. Scranton, deceased, and James H. Gulick, administrator of Joseph Fellows, deceased, for alleged damages to the lot and building of said church, sustained by the settling of the sur-

[1] *Jones* v. *Wagner*, 13 M. R. 690. *Horner* v. *Watson*, 14 M. R. 1, and *Chadwick* v. *Coleman*, Id. 9, distinguished.

face of the lot, occasioned by the mining of coal by the defendants, the Scrantons, who were the lessees of Fellows, the other defendant.

The substantial portions of the contract, and the material facts, will be found set forth in the opinion of this court.

The court below charged that under the contract of May 1, 1860, referred to in the opinion, the mineral owners were bound to leave complete support to the surface.

The verdict was for plaintiffs for $9,740.14, and after judgment thereon defendants took this writ.

ANDREW T. MCCLINTOCK, ALFRED HAND, I. J. POST and STANLEY WOODWARD, for plaintiffs in error.

HENRY W. PALMER and HENRY M. HOYT, for defendants in error.

MERCUR, J., delivered the opinion of the court.

This is an action on the case. It was brought to recover for the damages done to the lot and building of the defendants in error, by reason of the mining of coal beneath, by the plaintiffs in error; the former owned the surface right of the land, the latter all the coal beneath the surface.

Joseph Fellows was the owner of a larger tract of land, of which the lot in question formed a part, underlaid with coal. While thus the owner in fee, on the 1st of May, 1860, he, by contract in writing, agreed to sell the lot on which the alleged damage was sustained to Emily E. Preston. After describing the lot, the contract proceeds: "Excepting and always reserving all the coal beneath the surface of and belonging to said premises, with the exclusive right to the said Joseph Fellows, his representatives and assigns, to mine and remove the same by any subterranean process incident to the business of mining, and also to pass through the said premises by any subterranean passage, to mine and remove the coal from any adjacent lands, without the right, however, to enter upon the surface of said premises for any purpose whatever." Ten per cent. of the purchase money was to be paid down, and the residue in ten annual installments. On the full payment of the purchase

money, Fellows was to execute and deliver a good and sufficient deed in fee simple, "reserving the coal and privileges above stated, and with a full and unconditional release and discharge forever, on the part of the said party of the second part, her heirs and assigns, to the party of the first part, his heirs and assigns, from any liability for any injury that may result to the surface of the said premises from the mining and removal of the said coal; and with a quit-claim on the part of the party of the second part to the party of the first part, his heirs and assigns, of all right, title and interest in and to said coal, and the privilege of mining and removing the same as aforesaid." She took possession of the lot soon after, and made some payment thereon. Probably early in 1861, the precise time is not shown, she transferred her interest under the contract to the defendants in error, who erected the church building thereon. They afterward paid the residue of the purchase money due on the contract, and on the 27th April, 1867, Joseph Fellows conveyed the lot to them, "excepting, nevertheless, and always reserving all the coal beneath the surface of and belonging to the said premises, with the exclusive right to the said Joseph Fellows, his heirs and assigns, forever to mine and remove the said coal by any subterranean process," as stated in the contract, "to have and to hold the said land subject to the exceptions and reservations as aforesaid." In the same deed, duly executed by the appellees, they also did thereby "grant and convey unto the said Joseph Fellows, his heirs and assigns, the exclusive and indefeasible right to mine and remove the said coal as aforesaid; to have and to hold the same unto the said Fellows, his heirs and assigns, forever."

On the 30th of July, 1860, while Emily Preston held the equitable title to the surface, Joseph Fellows, by indenture, leased to said Scrantons, "all the coal in and under said lot and other lands, for and during such term and period of time as shall be required therefor to mine and remove all said coal." The lease further stipulated "the said coal to be mined and taken out by said Scrantons in such manner as they may deem proper, and according to their own discretion." They are not to be responsible for the falling in of said mines or the surface of said lands in any case whatsoever, nor shall they be required to leave pillars or other supports to prevent the falling of the

surface, or for any other purpose except under certain lands, including the lot in question, where "the said Scrantons shall, in mining, leave such pillars and supports as shall be deemed by those having experience in mining, to be sufficient to prevent the surface from falling in." This lease was duly acknowledged at its date, and recorded not long thereafter. In mining under this lease the alleged injury was done to the surface, and the action was brought against both lessor and lessees and their representatives.

The main contention arises under the agreement of 1st May, 1860. The learned judge held substantially that it gave to Emily Preston and those claiming under her an unqualified right of support to the surface from the owners of the coal beneath. This conclusion is claimed to be sustained by the authority of *Jones* v. *Wagner*, 16 P. F. S., 429; *Horner* v. *Watson*, 29 Id. 242; and *Chadwick* v. *Coleman*, 30 Id. 81. An examination of these cases shows they were ruled on a state of facts essentially different from those in the present case, and therefore they do not control it. They dealt with presumed and implied rights and duties in the absence of any specific agreement as to the measure of care and skill in mining, and removing the coal without leaving suitable supports. Hence, in *Jones* v. *Wagner* it was said, "contract may devote the whole minerals to the enjoyment of the purchaser without supports if the parties choose." *Horner* v. *Watson* was this: Horner was the owner of an upper mine. In excavating his coal he removed the ribs or pillars which supported the roof of his mine, thereby causing the surface above to sink and crack, so that the water therefrom flowed in and through his mine, and into a lower mine of Watson. It was held, the latter could recover from the former for the injury thereby sustained, although it resulted from the approved, established and customary practice of mining in that region, and without negligence. That the surface could not be destroyed by following a prescription or custom, for a claim destructive of the grant could not be set up by any usage. Here, too, there was no specific agreement as to the manner in which the coal should be removed, or the mine supported. The fact that the rights and duties of the parties might have been changed by agreement is clearly implied in that portion of the opinion in which it is said a careful examination of the

agreement discloses nothing to take the case out of the rule stated. *Coleman* v. *Chadwick* also rules that when the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled to so much only of the minerals as he can get without injury to the surface, and a custom contrary to such right would be unreasonable and invalid. There was no express agreement in this case as to the manner in which the mines should be worked, and the fact that the mining had been done according to the usual course and practice, and without any negligence, was held insufficient to protect from liability when there was an omission to leave ribs or pillars of coal or other supports for the surface. I dissented from the judgment in each of these last cases. Yet I recognize them as authority in cases where they apply. They do not apply to a case like the present, of an express agreement fixing and defining the rights of the parties.

In the contract of 1st May, 1860, Fellows agreed to sell, "excepting and always reserving" all the coal. Coal in place is land. As early as *Comyn* v. *Wheatly*, Cro. Jac. 150, it was held in England that ejectment would lie for a coal mine. The objection that it was beneath the soil was held insufficient to defeat it. This case was cited approvingly in *Caldwell* v. *Fulton*, 7 Casey, 475. It is there held that minerals beneath the surface of a tract of land may be conveyed by deed, distinct from the right to the surface. They are a corporeal hereditament, and may thus be severed by conveyance.

So in *Turner* v. *Reynolds*, 11 Harris, 199, it was held that a coal mine may be described and recovered in an action of ejectment as land, although the plaintiff did not claim or assert any title to the soil or surface of the tract, but only to the coal beneath. A mine right, severed from the ownership of the soil, may be regarded as a separate close, and compared to the lower story of a building. The law implies an obligation on his part to keep it in a suitable condition to support the upper stories owned by others, and that the owner of the upper story shall maintain the roof for the protection of those owning below him. There is, however, nothing in this implied duty and obligation to prevent either from being relieved therefrom by agreement with the other.

The contract with Emily Preston excepts from the agreement to convey part of the land by clear and apt words. Fellows held the coal as absolutely after the contract was executed as before. It can not be objected that the exception was as large as the grant, and therefore void. The coal is a part of the land that would otherwise have passed, it is true. By excepting that and selling the surface of the land, enough property passed to the vendee to give full effect to the agreement. The court, therefore, erred in saying that the right contended for "would present the anomalous feature of a grant of an estate in land accompanied by a reservation totally destructive of the grant." *Whitaker* v. *Brown*, 10 Wright, 197.

The exception proceeds "with the exclusive right to the said Joseph Fellows, his representatives and assigns, to mine and remove the same by any subterranean process incident to the business of mining." Thus there is a clear recognition that he retains as full property in, and dominion over, all the coal, and could transfer the same to his heirs and assigns, as if he had not agreed to convey other parts of the land. It is not a mere license to mine, nor a reservation out of something previously granted; but it is an exception out of the grant so that no title to the coal should pass from him. He excepts "all the coal." There is no limitation as to the time nor the purpose for which it shall be taken. Under no circumstances was it to become the property of Emily Preston. The absolute right of property in the coal remained in Fellows, but he was not at liberty to sink shafts through the surface of the land for the purpose of mining it. He must reach and remove it by subterranean process. If in so doing the surface should be injured, the question arose, how and to what extent should he be relieved from liability therefor? On the payment of the purchase money, the agreement provides that Fellows shall execute and deliver a deed reserving the coal and privileges stated; but at the same time Emily Preston, for herself, her heirs and assigns, shall give "a full and unconditional release and discharge forever" to said Fellows, his heirs and assigns, "from any liability for any injury that may result to the surface of the said premises from the mining and removal of said coal, and with a quit-claim on her part, her heirs and assigns, of all right, title and interest in and to said coal, and the privilege of mining and removing the

same as aforesaid." "As aforesaid" not only refers to the subterranean process, but still more clearly to the absolute "release and discharge" from all liability for injury to the surface just before mentioned. Thus in clear, express and distinct language it was agreed, the owner of the mine, his heirs and assigns, should be exempt from the very liability now attempted to be fastened on him and his assigns. We see no reason why a person shall not be bound by his agreement to exempt another from liability for damages in working a coal mine, as well as from liability for damages resulting in the performance of any other kind of labor. No rule or policy of law forbids it. The undoubted intention of the parties to the contract was, that Fellows might mine and remove the coal without any obligation to support the surface, or liability in case it fell. It was well said by Justice Blackburn, in *Smith* v. *Darby*, Law Rep., 7 Q. B. 716: "The man who grants the minerals and reserves the surface, is entitled to make any bargain he likes; both parties are just as much at liberty to make a bargain with reference to coals and minerals as to make a bargain with reference to anything else." The same rule applies when one grants the surface and retains the minerals. In each case the question is, did the parties agree there should be no obligation in regard to support?

On the 30th July, 1860, while this contract was in force, Fellows executed the lease to the Scrantons. Although called a lease, it was virtually a sale of all the coal, with unlimited time to remove it, with the right at their election to yield it up after the expiration of ten years. It was therein stipulated that the Scrantons should "not be responsible for the falling in of said mines or the surface of said lands, in any case whatsoever;" but in mining they were required to leave such pillars and supports as should be deemed sufficient by those having experience in mining, to prevent the surface from falling. While the language in this lease differs somewhat from that contained in the agreement with Emily Preston, yet it is evident the intention was to pass to the Scrantons substantially all the right and power which Fellows had to mine and remove the coal, without liability for damages. He did not attempt to give them greater immunities than he possessed, but rather less. When the defendants in error afterward pro-

cured from Emily Preston an assignment of the contract, it gave them full notice of the rights of Fellows, and of his exemption from liability. They acquired her equities only. It is probable that the lease to the Scrantons was then recorded, thus giving to the defendants notice that Fellows had transferred his rights. If not then recorded, it was soon thereafter, and several years before the defendants in error obtained the deed from Fellows. The fact that it omitted the clause releasing Fellows, his heirs and assigns, from all liability for damages from injury arising in mining, could not take from the Scrantons rights which he had previously transferred to them. The defendants in error purchased the interest of Emily Preston in the contract, subject to all the obligations therein imposed on her, affecting the title. She could not compel a delivery of the deed without fulfilling her obligation to release and discharge Fellows as therein stated. It was to be done cotemporaneously with his deed, and to be contained in the deed which she covenanted for herself, her heirs and assigns, to make to him. Her covenant was in regard to the enjoyment of a thing *in esse*. It ran with the land and the defendants in error, as purchasers from her, took the land subject thereto: *Cathcart* v. *Bowman*, 5 Barr, 317. It therefore follows that the Scrantons are not liable for the reasonable exercise of any right which they acquired from Fellows, under the terms and conditions of the lease, at a time he possessed that right, and he can not in this action be liable to the defendants in error in case he afterward conveyed to them rights which he had previously granted. In so far as the rulings of the court are contrary to this opinion, the assignments are sustained. We discover no substantial error in the remaining assignments.

Judgment reversed and a venire facias de novo *awarded.*

WILMS v. JESS.

(94 Illinois, 464. Supreme Court, 1880.)

Mine owner bound to support surface. Where the surface belongs to one and the minerals to another, without qualification other than the fact of severance, the owner of the minerals must leave support sufficient to maintain the surface in its natural state.

Support a servitude on the mine. The rule is well settled that when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the mineral as he can get without injury to the superincumbent soil.

Incidental weight of buildings. Although the mine owner is not bound to leave support more than sufficient to stay the surface, yet if a subsidence occur, the mere presence of a building will not prevent a recovery, unless it be shown that the subsidence would not have occurred without the aid of the buildings, and the mine owner will be liable for the damage, both to the building and to the land.

Idem—Where subsidence caused by added weight. The act of removing all supports from the superincumbent soil is, *prima facie*, the cause of its subsequently subsiding; but if the subsidence is in fact caused by the weight of buildings erected on the surface after the execution of a lease to the defendant authorizing him to take the mineral beneath the surface, that may be shown in defense as contributive negligence.

Lease construed as to pillars and support. Where a mining lease stipulated that no pillars should be withdrawn within 600 feet of the shaft, and the whole clause relates to the manner of working the mine and the condition in which it should be left, it was held that the lessee was not by implication authorized to withdraw pillars or supports beyond the prescribed distance so as to cause a subsidence of the superincumbent soil.

Appeal from the Appellate Court for the Third District.

PALMER, PALMER & ROSS, for the appellant.

PATTON & LANPHIER and MCGUIRE & HAMILTON, for the appellee.

SCHOLFIELD, J., delivered the opinion of the court.

Appellee brought an action on the case against appellant and another, in the Circuit Court of Sangamon County, for

injuries to appellee's premises, caused by the removal by the appellant and his co-defendant of the underlying strata of coal, without leaving sufficient support for the surface.

The entire title to the lot of ground involved in the litigation was originally in Jacob Bunn, but, on the 20th day of March, 1870, he leased to the assignor of appellant, and his co-defendant, "the sole and exclusive right of boring, digging and otherwise prospecting for coal," in a large body of land, including this lot, and of "taking out and working the said coal, together with the right of way and surface of so much of the tract as may be necessary for the economical use of the same." The lease contained, among others, this clause: "It is further understood and agreed that the said party of the second part shall mine the coal in a workmanlike manner, no pillars to be withdrawn within six hundred (600) feet of the shaft; and that the entries giving access to the coal not mined at the termination of this lease, shall be turned over to the party of the first part in as good condition as the nature of the mine will admit."

On the 5th day of October, 1877, Bunn, having previously sold, conveyed this lot to appellee, making this exception in the deed: "Except all coals and minerals of every description under the surface of said premises (which is hereby expressly reserved), and the right to take therefrom all coals and minerals, with the privilege of extending entries thereunder."

Appellee at once took possession of the lot, and soon thereafter commenced making improvements thereon, and had dug a well, constructed a cistern, begun the erection of a house, which was estimated to cost some $5,500, and progressed therewith until the brick work was completed, the frame work raised and sheeted, ready for weather-boarding, and the roof and cupola completed, when the surface of the underlying soil suddenly subsided for the distance of some three feet, and thereby seriously damaged the house and destroyed the well and cistern.

This was caused by appellant and his co-defendant mining and removing the strata of coal underlying the lot.

The gist of the action as averred in the several counts of the declaration is the mining and removal of the coal without leaving sufficient support for the surface.

Appellant and his co-defendant pleaded not guilty. The cause was submitted to a jury, who returned a verdict finding the defendants guilty, and assessing the plaintiff's damages at $1,000. The circuit court, after overruling motions for new trial and in arrest of judgment, rendered judgment upon this verdict, and appellant took the case by appeal to the appellate court for the third district, where the judgment of the circuit court was affirmed.

The present appeal is from that judgment of affirmance.

The lease under which appellant claims, confers the right to work the mine and take out the coal, and as incident thereto, the use of usual and appropriate means therefor, and it also gives a right of way and surface use of so much of the superincumbent soil as is necessary for the economical and efficient working of the mine. It does not, however, assume to confer any right to destroy or injure or further burden the superincumbent soil.

Where the surface of land belongs to one, and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals can not remove them without leaving support sufficient to maintain the surface in its natural state: *Humphries* v. *Brogden*, 12 Q. B. 743; *Harris* v. *Ryding*, 5 M. & W. 59; *Smart* v. *Morton*, 5 E. & B. 30.

But, it is contended, appellant and his co-defendant were exonerated from protecting the surface, because the lease here stipulates that "no pillars shall be withdrawn within six hundred feet of the shaft," upon the principle that, "having expressed *some*, the parties have expressed *all* the conditions by which they intend to be bound under that instrument."

By looking to the lease we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner; that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of the lease, shall be turned over, etc., in good condition, etc., etc., all for the obvious purpose of preserving the shaft and access to coal not mined.

No attempt is made to regulate the rights and obligations of the parties in respect of the superincumbent soil, further than to confer the right of way thereover, and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law.

The rule is well settled, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil: *Coleman* v. *Chadwick*, 8 Pa. St. 81; *Horner* v. *Watson*, 29 P. F. S. 251; *Jones* v. *Wagner*, 10 Id. 429; *Harris* v. *Ryding*, *supra*; *Zinc Co.* v. *Franklinite Co.*, 13 N. J. (2 Beas. Ch.) 342; *Smart* v. *Morton*, *supra*. And it is held, where a land owner sells the surface, reserving to himself the minerals, with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power: *Hext* v. *Gill*, L. R., 7 Ch. App. 699. But it is contended this obligation to protect the superincumbent soil only extends to the soil in its natural state, and that no obligation rests on the owner of the subjacent strata, to support additional buildings, in the absence of express stipulation to that effect. This is doubtless true; but "the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself: Wood on Nuisance, § 201; *Brown* v. *Robins*, 4 H. & N. 185; *Homer* v. *Knowles*, 6 Id. 459.

The act of removing all support from the superincumbent soil is *prima facie* the cause of its subsequently subsiding; but if the subsiding is, in fact, caused by the weight of buildings erected subsequent to the execution of the lease of the mine, this is in the nature of contributive negligence, and may be proved in defense. The authorities do not require that plaintiff's proof shall exclude that hypothesis in the first instance.

The finding of the appellate court that the judgment of the circuit court is sustained by the evidence, there being evidence tending to that end, relieves us from a discussion of the evidence.

We think the instructions given by the circuit court are substantially in harmony with the views herein expressed, and there is no error of law complained of in any other respect.

The judgment of the appellate court is affirmed.

Judgment affirmed.

DAVIS V. TREHARNE.

(Law Reports, 6 Appeal Cases 460. House of Lords, 1881.)

[1] **Permission to work in the "usual" and "approved" way.** A clause in a mining lease that the lessee may work in the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground mines for mining purposes, but does not suppose a custom to work the mines so as to injure or interfere with the rights of other property.

Surface destruction not allowed by implication. Nor did the words that the mining lessee should have the right to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works and things upon, in or under or above the said premises as shall be necessary or convenient for working and carrying away the same," making compensation, etc., enlarge the power so to deal with the mines as to let down the surface.

Common law right as affected by contract. In common right, the person who owns the surface has a right to have it properly supported below by minerals, A court of law has to look at the documents to see whether the parties have agreed upon something different from the common right.

This was an appeal from a decision of the Court of Appeals, affirming one of Lord Coleridge, C. J.

In January, 1865, J. P. Treharne demised to Davis certain veins, mines and seams of coal, ironstone, etc., being part of the minerals under a farm called Llwydarth, in the county of Glamorgan, with power to Davis to enter into and upon certain parts of the said farm, and to open, get and carry away

[1] *Smart* v. *Morton*, 13 M. R. 655; *Buchanan* v. *Andrew*, L. R. 2 Sc. App. 286; 5 Moak, 125.

the said veins, etc., subject to certain rents and royalties. Davis covenanted to work the said veins, etc., "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan," and at the end of the term to compensate the lessor for any damage done to the surface of the said farm.

In January, 1869, Treharne granted a ninety-nine years' building lease of part of the farm, "with the cottage or dwelling house and outbuildings thereon," to Thomas Thomas, reserving the minerals with power to the lessor, his heirs and assigns, or other persons entitled to the reversion, "to enter and be upon the said premises to search for, win and work and carry away the minerals, etc., in or under the land, or in or under any other lands, which, or the mines and minerals under which, may for the time being belong to the said J. P. Treharne, and to erect all such buildings, machinery and things," etc., "he and they making reasonable compensation" to Thomas, his assigns, etc., "for all damage occasioned by the exercise of the rights hereby reserved."

Thomas' lease passed by assignment to the respondent, Wm. Treharne.

In July, 1869, Davis surrendered his mining lease and took a fresh one comprising all the veins of coal, etc., lying under the said farm. The covenants were precisely similar to those in the original lease.

In 1871 J. P. Treharne granted a building lease of the residue of the farm to Wm. Treharne, reserving the minerals with power to the lessor, his heirs and assigns, or the persons entitled to the reversion, etc., to enter upon the land, and search for and carry away the minerals, etc., in or under such land, and to erect buildings, etc., "and do and execute all such other acts, works and things upon, in or under or above the said premises as shall be necessary or convenient for working and carrying away the same; he and they making reasonable compensation to the said William Treharne, his executors, administrators and assigns, for all damage occasioned by the exercise of the rights hereby reserved."

In 1878, the respondent, Treharne, brought an action against Davis for injury caused to his land and the houses erected thereon, by the letting down of the surface in consequence of

the working out of the minerals. The action was tried before Lord Coleridge, at Swansea, and the jury found that the houses were injured by the letting down of the surface occasioned by the working of the mines since July, 1869. It was admitted that the working was in the usual and most approved manner prevailing in the county of Glamorgan. The damages were assessed by an official referee at £700, and Lord Coleridge gave judgment for that amount, and an injunction restraining the defendant from working so as to cause further damage.

This decision was affirmed by the Court of Appeals. Davis then brought this appeal.

THE SOLICITOR-GENERAL (SIR F. HERSCHELL) and BENJAMIN, for the appellant, contended that the terms of the leases authorized the letting down of the surface. The usual and most approved manner of working in the county of Glamorgan had been admittedly followed, and the building lease reserved the power of doing acts and things under the surface necessary or convenient for working the coal, and compensation was to be paid for damage caused by the exercise of the right reserved. The only damage which could be occasioned by works underground was the letting down of the surface.

They cited the following cases: *Aspden* v. *Seddon*, Law Rep. 10 Ch. App. 394; *Eadon* v. *Jeffcock*, Law Rep. 7 Ex. 372; *Taylor* v. *Shafto*, 8 B. & S. 223; *Benfieldside Board* v. *Consett Iron Co.*, 3 Ex. D. 54.

MCINTYRE and B. F. WILLIAMS, for the respondent, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).

I believe none of your lordships has any doubt on this case, and under those circumstances it is not necessary to call upon the learned counsel for the respondent.

The first question is, whether in the mining lease which was granted to the defendant, Mr. Davis, there was a power as against the lessor, to let down the surface. It appears to me that there is no portion of the lease which in any way justifies any such conclusion. It is a lease carefully prepared in a form

usual in mining leases. It gives the lessee power to work the veins, mines and seams, in the usual way. It gives large surface privileges; it excepts certain mines, veins and seams and it provides (this is the clause mainly relied upon) that the lessee shall work the said seams and veins of coal during the continuance of the demise "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan." It appears from parts of the evidence, and it was not in dispute at the trial, that, subject to the question of the right to let down the surface or to injure the surface by taking away the coals, the actual working of this mine was carried on "in the usual and most approved way" in which such works were performed in other parts of the county of Glamorgan. I assume that in the appellant's favor.

But what does that mean? It refers simply to the mode of carrying on the underground works in the mine, which can not by possibility, either in the county of Glamorgan or anywhere, be a custom or manner or method of working, without regard to the rights of other persons. It is impossible that those words, "the usual and most approved way of working in the county of Glamorgan," can have been intended to absolve the lessee from a legal obligation collateral to the working of the mine. For this purpose it can not make any difference whether the question arises between a lessor, who is owner of the surface and his lessee, or between the lessee and a surface owner who is not lessor. Those words are equally apt, equally effectual, and have the same meaning in each of those cases. They relate simply to the manner of working the mine for mining purposes; they have no reference to the rights of other persons, which there could not possibly be any local custom in such a district as a county to disregard, and which must be respected in carrying on those works; they can not be understood to have been meant, by either of these parties, to signify that the working must be carried on as if there were no such rights of other persons, or of the lessor himself, which the lessee was bound to respect.

That point being determined, the case (as was admitted by the learned solicitor-general) is really at an end, because the other document, the surface lease under which the plaintiff claims, can not confer any right upon the lessee of the mines.

The most that it does, is to subject the surface lessee to such burdens as, according to its true construction, the lease of the mines imposes on him. I will, therefore, say no more upon that subject than that I can not read the words "or under," which were relied upon, as in any way requiring an implication that the parties contemplated such underground works as might injure the surface. It appears to me that the powers given by the clause in which those words occur, to "execute all such other acts, works and things upon, in or under or above the premises as shall be necessary or convenient for working and carrying away the same"—that is, the mines and minerals previously mentioned, are introduced for a merely subsidiary purpose, and that we must look to the principal words which precede them, to see what were the reserved powers, and for what purposes they were reserved. The previous words have no tendency whatever to show that it was meant to give any power to take away minerals so as to injure the surface.

The last point which Mr. Benjamin made, I confess, appears to me to have nothing in it. The learned judge asked three particular questions of the jury, which were answered, and which had reference, no doubt, to the real issue between the parties, and not to matters which were not in controversy. There does not seem to have been any controversy as to the precise time at which anything was done before 1871, or its precise effect upon the question between the parties. No such question arose at all, and the evidence appears to have been such as really to exclude it. I consider that we are dealing simply with the case of a verdict in favor of the plaintiff and £700 damages found, not indeed by a jury, but by a referee substituted for a jury; and that there is no ground to infer that any part of those damages was given in respect of any act or matter for which, as between these parties, the defendant ought not to be responsible to the plaintiff.

I therefore move your lordships to affirm the judgment of the court below, and to dismiss the appeal with costs.

LORD BLACKBURN.—I am entirely of the same opinion. I think it must be taken as perfectly settled ground that, as of common right, the surface land has a right to be supported by subjacent strata of minerals. Although that is common right,

it may be shown—the burden lying upon those who wish to show it—that the person who has got the surface, obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him. In common right, the person who owns the surface has a right to have it properly supported below by minerals, and, if there are mineral workings under the surface, to have a proper support left for it by pillars.

The question here arises whether upon these deeds that right of support was taken away. I think wherever there is a lease of minerals granted to a man on the terms that he shall raise the minerals and pay a royalty on the minerals he raises, there is an inducement, an object, on the part of the grantor of the lease to wish to have as much mineral as possible brought out so as to get a greater benefit in the shape of royalty. If he has the power of controlling the surface, if it is still in his possession or under his control, so that he may deal with the surface as he likes, it may be a very prudent thing for him to agree with the person who takes the lease of the mines that he shall raise all the coal whatsoever, without regard to whether it lets the surface fall down or not, because the lessor may think that the value of the royalty upon the coals will, to him, far exceed any mischief that may occur upon the surface. Whether he would be right in so thinking or not would depend upon what the nature of the surface was, and what was the value of the minerals below. If it was a piece of moorland pasture lying above some very extensive and valuable coalfields, I suppose nobody would venture to say that he would not greatly prefer to draw the mineral rent and let the pasture go. He would say, "letting the pasture go will not do me a great deal of harm, and getting the mineral royalty will do me a great deal of good." On the other hand, I suppose nobody would doubt that if a man had the minerals below building land, upon which a very valuable set of buildings in a town had been erected, it would not be good sense on his part to say, "I require the mineral lessee to take away the minerals,

and let the houses come tumbling down;" that would be folly But that is not what we have to consider—that is what the parties had to consider for themselves—namely, was the nature of the property such that it was a prudent and judicious thing to bargain that the mineral lessee should take all the minerals, paying a royalty rent upon them, and letting down the surface, if such was the consequence; or was it a prudent thing to say that he should take it upon the terms that he was to get all the minerals he could, respecting the right of support of the surface? Which of these alternatives was the more prudent it was for the parties to consider.

But what I apprehend a court of law has to do is to look at the documents, and see whether the parties have agreed upon something different from the common right. If Mr. Treharne, when he let the land, had by express words or by necessary implication said: "You may take away all the minerals," or "You must take away all the minerals, letting down the surface," he had a perfect right, at least before he had made the two building leases, to do so. But, whether he has done so or not, is a question turning upon the construction of the documents. And when I come to look at the documents, though one is more ready, it being a lease, to believe that the parties meant to say, "You shall take all the minerals, letting down the surface," than one would have been if it was a sale, or a reservation of minerals below, to be taken out at some future time, I can not agree with what seems to have been said (I do not know whether that was what was meant) by Mr. Baron Cleasby, in the case of *Eadon* v. *Jeffcock* (Law Rep. 7, Exch. 379). I can not agree that it follows from that that there is not a right of support. I think the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that it is not enough of itself to decide that question.

Looking at these two documents, I can not find anything that takes away that right of support. It is quite true that where parties have agreed in this way—you shall make compensation for whatever injury you do in respect of these rights, and amongst other things, you shall make compensation for what you do in letting down the surface—the conclu-

sion is very strong from that, that the lessor says, you may let down the surface. I do not say that it is conclusive, but it is a very strong argument, if you find that clause, to say that he did mean that the lessee might let down the surface. But when you find it said, as it is here, that he shall do certain things underground and a great many things upon the surface, and afterward make compensation (as it is said in the lease) "for all damage occasioned by the exercise of the rights hereby reserved," or (as it is said in the lease) shall at the end of the lease "compensate the lessor for any damage or injury done to the surface of the said farms and lands" (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), and when we find that those rights do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I can not see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more, and let down the surface. Yet that is really the whole argument; it stands upon that—that because a clause saying you shall make compensation for letting down the surface affords a strong argument for saying you may let down the surface, therefore a clause saying you shall make compensation for damage done to the surface affords a strong argument for saying that the lessee might let down the surface. I can not see that. It does not seem to me to be any argument at all.

As to the last point Mr. Benjamin took, when we come to look at it, I think it would be a monstrous iniquity if we were to yield to it. It appears to me that the real controversy at the trial was whether the damage was occasioned by working out the old Victoria seam, long before Mr. Davis, the defendant, had anything to do with the mines, or whether the damage was occasioned by the taking away of certain pillars in the years 1874 and 1875. The two surface leases were in 1869 and 1871. Lord Chief Justice Coleridge, in summing up to the jury, said, and everybody I take it then said: "The real question is, was the damage done before 1869 or after?" Now it is said that that leaves it open to be a possible thing that it was done between 1869 and 1871. That is clearly against all

the contention that was made at the trial, and it would be a monstrous thing if, for such a trifle as that, which it would hardly be using too strong a phrase to call a slip, we were to set aside the verdict.

I am clearly of opinion that the judgment is right, and should be affirmed.

LORD WATSON.—I agree with your lordships in the result at which you have arrived.

When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract; in other words, they must express their intention so clearly as to enable a court to say that such intention is plain. I think that rule was laid down by the late Lord Justice Mellish in the case of *Hext* v. *Gill*, Law Rep. 7, Ch. App. 699, and I quite agree with that ruling. It may be done in express terms; but, of course, it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor* v. *Shafto*, (8 B. & S. 228), where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface.

But, applying those principles to the present case, I am quite unable to find in the terms of this mineral lease of July, 1869, anything to countenance the view that the parties did intend to take away from the landlord, who was letting his minerals, the right to have the surface supported. The clauses with regard to working, and the clause with regard to compensation, are clearly not intended to have any bearing upon the question which is now raised. The clause as to working implies no obligation to work any particular seam or to work any particular part of the seam; and there is nowhere in the four corners of this lease any obligation laid upon the tenant to work out the whole of the minerals. I think the conception of the lease shows that it was intended that he should leave workable minerals at the end of his lease, because he

contracted to leave the plant and fittings of the mine in good and proper condition; and those numerous stipulations which follow this, which were so largely commented upon by the learned counsel at the bar, were all for the purpose of keeping the mine in proper order, so that the landlord, either by self or tenant, might enter upon it at the expiry of this lease.

The clauses as to compensation for surface damage would have that bearing if, as was very ingeniously argued by Mr. Benjamin, all those particular things which are mentioned immediately before had been mentioned as causes of injury to the surface. I can not so read them. The two things are quite distinct. The one obligation is to leave everything that is necessary for due working of the mine in proper order at the termination of the lease. The other, which is quite distinct, is an obligation to compensate the landlord for any permanent injury done to the surface of his estate by reason of the operations of the mineral tenant during his working.

Therefore, I have no hesitation, whatever, in holding that the argument addressed to us is ill founded; and I will only add that it appears to me that every one of those clauses which have been so strongly founded upon would have been an intelligible and appropriate clause in this lease, even though it had contained an express provision to the effect that the tenant in working should not let down the surface of the ground.

I so entirely concur with your lordships upon the other points of this case, which are perhaps not so material as that which I have dealt with, that I do not think it necessary to add anything to what has fallen from your lordships.

Judgment under appeal affirmed, and appeal dismissed with costs.

1. Right of canal proprietors to lateral support under Canal Act upon paying compensation: *Midland Railway* v. *Checkley*, L. R., 4 Eq. 19.

2. A reservation of all coal to the grantor in a deed gives him the title to all the coal but does not authorize the removal of pillars necessary to support the surface: *Harris* v. *Ryding*, 5 M. & W. 60; *Livingston* v. *Moingona Co.*, 10 M. R. 696; *Carlin* v. *Chappel*, 101 Pa. St. 348; 47 Am. R. 722.

3. Right of railway to support: *Caledonia R. R. Co.* v. *Sprot*, 2 Macq. 449.

4. Right of railway to lateral support enforced against a party from whom the railway has purchased its way by compulsory process; and the

working of mines to the injury of such support restrained by injunction: *North Eastern R. R.* v. *Elliott*, 30 L. J., Ch. 160; 32 Id. 402. See also, *Reg.* v. *The A. & C. N. Co.*, 8 Jurist (N. S.) 115.

5. A covenant for compensation to the surface owner in a deed reserving minerals will not be construed to the prevention of injury by undermining buildings, but must be taken as contemplating the commission of such injury: *Aspden* v. *Seddon*, L. R., 10 Ch. App. 394.

6. A man may not, by digging on his own land, remove the natural support of his neighbor's land, so that it can not stand by its own coherence: *Farrand* v. *Marshall*, 21 Barb. 409; 19 Id. 380.

7. Where the working of mines, in however careful a manner, has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damages to buildings thereon, although erected within twenty years, provided their weight did not contribute to the subsidence: *Stroyan* v. *Knowles*, 6 H. & N. 454.

8. Degree of care to protect surface required of party having the right to remove coal: *Liringstone* v. *Moingona Coal Co.*, 10 M. R. 696. The liability, absolute: *Carlin* v. *Chappell*, 100 Pa. St. 348; 47 Am. R. 722; *Nelson* v. *Hoch*, 14 Phila. 655.

9. Lease of land with reservation to lessor of mines and minerals and power to work same, entitles the lessee to the support of the surface: *Proud* v. *Bates*, 15 M. R. —.

10. Right to support after reservation: *Richards* v. *Jenkins*, 18 L. T. N. S. 437. Distinction between liability of adjacent and subjacent mines: *Id.*

11. *Quære:* whether independently of prescription the owner of the surface has not a right to the vertical support of the subjacent strata for the surface and for all reasonable building upon it: *Rogers* v. *Taylor*, 2 H. & N. 828.

12. Prescriptive right to surface support a question for the jury: *Id.*

13. *Prima facie*, the owner of land is entitled to the surface itself, and all below it, *ex jure naturæ*, and when there is a severance of the mineral from the surface ownership, with a right, by the terms of the award, in the mine owner to disturb the surface, the erection of buildings subsequent to the vesting of the right to disturb the surface can not vary the rights of the parties: *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; 3 E. & E. 752; 6 El. & Bl. 593; 8 Id. 123; *Roberts* v. *Haines*, 6 El. & Bl. 643.

14. The act (41 Geo. 3, C. 109, S. 32,) construed so as to give a right to work certain mines to the utter destruction of the land above: *Buccleuch* v. *Wakefield*, L. R., 4 H. L. 377, reversing; *Wakefield* v. *Buccleuch*, L. R., 4 Eq. 613.

15. General discussion of the right to support: *Ryckman* v. *Gillis*, 57 N. Y. 68; 15 Am. R. 464; *Blackett* v. *Bradley*, 1 Q. B. 940; *Brown* v. *Torrence*, 10 M. R. 692.

16. The right of support does not extend to additional weight (buildings) imposed on the soil: *Marvin* v. *Brewster Co.*, 13 M. R. 40.

17. The mine owner must leave sufficient support to sustain the surface: *Humphries* v. *Brogden*, 12 Q. B. 739. The same as to lessee: *Burgner* v. *Humphrey*, 41 Oh. St. 340. And if lessee remove them he is liable both for damage done and the coal removed: *Id.*

18. A custom to work mines without leaving support to the surface is unreasonable: *Hilton* v. *Granville*, 5 Q. B. 701; *Wilkes* v. *Broadbent*, 1 Wils. 63; 2 Strange, 1224; *Broadbent* v. *Wilkes*, 1 Willes, 360. See *Randolph* v. *Holden*, 9 M. R. 29.

19. Weakening of surface support enjoined: *Thomas Co.* v. *Allentown Co.*, 8 M. R. 36.

20. The doctrine of lateral support does not apply to placers, owned only to be washed away: *Hendricks* v. *Spring Valley Co.*, 58 Cal. 191; 41 Am. R. 257.

JONES ET AL. V. JACKSON ET AL.

(9 California, 237. Supreme Court, 1858.)

Property in tailings. The pay dirt, and under certain circumstances the tailings, are the property of the party producing them.

[1] **Locating place of deposit for tailings.** When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose, provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient.

[2] **Abandonment of tailings.** To suffer the tailings to flow where they list without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary.

Allowing tailings to mingle. If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass; but it may be a circumstance to prove an intention of abandonment.

Where tailings are allowed to flow upon the ground of another, he becomes entitled to them.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action of trespass to recover damages for cutting and breaking dam of plaintiffs, erected below a tunnel mining claim, for the purpose of collecting tailings wasted from said claim; and also for washing away tailings, destroying sluice-boxes, etc. Complainant prays for damages, and also for an injunction enjoining and restraining defendants from taking or interfering with the tailings flowing down the ravine from the tunnel mining claim known as the Monte Cristo claim.

Some time in the summer of 1853, a company of miners, composed of several partners, located at or near Monte Cristo in Sierra county, a tunnel mining claim. Two other companies, called the Swanton and Exchange companies, located tunnel claims about the same period.

The Monte Cristo company tunneled into the mountain side over one thousand feet, and there reached a very rich lead

[1] *Rogers* v. *Cooney*, 14 M. R. 85; *Lincoln* v. *Rodgers*, Id. 79.
[2] *McGoon* v. *Ankeny*, 1 M. R. 9.

of gold-bearing gravel and cement difficult and slow to dissolve. The company commenced washing pay-dirt from said tunnel in February, 1854, through a sluice about one hundred and fifty feet in length. The tailings from the sluice deposited themselves on a flat below, about five hundred yards in length. In October, 1854 or 1855, the company built a sort of a dam or obstruction, some distance below the lower end of their sluice, to prevent the tailings from passing down the stream, and also put up on a tree near by, a notice stating that they claimed the tailings for re-washing. The Swanton and Exchange companies also deposited their tailings on this flat. There was usually a log laid down to divide and designate the tailings of these different companies; but it was often overrun and covered up, and thus the tailings of the different companies mingled together. This flat was the only place where the tailings could be deposited, as the banks were precipitous on either side, and it had been used for near two years for the deposit of all the tunnel companies in that locality.

About 1st or 12th of October, 1855, the defendants' grantors located and took up on this flat twenty surface mining claims under the name of the Express company, and including the ground upon which the tailings of the Monte Cristo company were deposited. They posted their notices on a tree a short distance above the head of the ground claimed by them, and soon after commenced working the ground. About three weeks after putting up the first notice, another was posted up near the middle of the claims. The testimony respecting the quantity of tailings on the flat and the existence of the dam of the Monte Cristo company at the time of the location of the Express company claims, is conflicting, but the weight of evidence is, that there were little or no tailings there, and no dam, but the dam was reconstructed in 1856. On the 22d of September, 1856, the plaintiffs purchased of the Monte Cristo company all the tailings of this company on the flat, and also all the tailings and waste water that flows down from said company's claim for one year therefrom. Subsequently, when plaintiffs commenced to wash the tailings, defendants interfered, drove plaintiffs off, and with an axe cut up and destroyed their sluices and tore down the dam, and ran the tailings into defendants' flume. On the trial, certain instructions were

given to the jury, and some denied. All of which appear in the opinion of the court.

HENRY MEREDITH, for appellants.

FRANCIS J. DUNN, for respondent.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

The Monte Cristo, Swanton and Exchange companies located separate claims for tunnel-mining, at or near the head of a very steep ravine, in 1853. The different tunnels of these different companies penetrated under the mountain to the distance of several hundred feet, where they found rich deposits of gold, in a hard formation, like cement, which did not dissolve readily in water, until after exposure to the atmosphere for a considerable space of time. From the character of this formation, it resulted that the first washings only extracted a portion of the gold, leaving the other portion to flow off with the tailings, which were deposited on a flat, several hundred feet below the mouths of the tunnels. The owners of the Monte Cristo tunnel posted a notice in 1854, stating that they claimed the tailings running from their sluices, and that they intended to wash the tailings again. The tailings from the different tunnels were partially mingled, though some effort was made to keep them distinct. The mass of tailings could readily be distinguished from the soil of the flat on which they were deposited, by the difference in color and appearance; and the flat was the first point where, from the natural features of that locality, the tailings could find a resting place. In the summer of 1855, the parties under whom the defendants claim, located some twenty claims, called the Express company's claims, on this flat, including a portion of the ground upon which the tailings were deposited. The Monte Cristo company sold their tailings to plaintiffs, who went upon the flat, and erected their sluices, which were abated by the defendants, under a claim of right. This suit was brought to recover damages for the injury. The defendants had judgment in the court below, and the plaintiffs appealed.

The court, at the request of the plaintiffs, instructed the jury that "if they believed that the Monte Cristo company were the first to appropriate the ground covered by the tailings, and, while continuing to hold and claim the same, said company conveyed the tailings caught or stopped on said ground to plaintiffs," and that afterward the defendants did the injury complained of, then the plaintiffs were entitled to a verdict.

After giving the first instruction, the court refused to give the second, as follows: "To entitle defendants to work the tailings from the Monte Cristo company, after being sold to plaintiffs, the defendants must show that they had purchased said tailings, or that said tailings had been permitted to run upon ground after such ground had been lawfully appropriated by defendants."

This instruction was properly refused, as it was too broad in its terms. By it, the defendants were not permitted to wash the tailings deposited upon the claims before they took them up, even conceding the intention of the Monte Cristo company to abandon them.

The pay-dirt, as it is called, and the tailings, were certainly the production of the labor of the company, to which they were justly entitled, under proper circumstances. When a place of deposit for tailings is necessary for the fair working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be reasonably necessary for this purpose, provided he does not interfere with pre-existing rights. His intention, however, should be clearly manifested by outward acts. Merely posting a notice would not seem to be sufficient. To suffer the tailings to flow where they list, without obstructions to confine them within the proper limits, is conclusive evidence of abandonment, unless there is some peculiarity in the locality, constituting an exception to the rule. It may happen in some localities that no artificial obstruction would be required to confine the tailings within the proper limits. In such case it would not be necessary to do an idle thing. But in this instance the flat was some five hundred yards long.

The court further instructed the jury, in substance, that if the Monte Cristo company constructed a dam upon vacant ground,

for the purpose of catching the tailings, and then sold them to plaintiffs, and the defendants afterward did the injury alleged, the plaintiffs were entitled to a verdict. But if the tailings were allowed to flow upon mining ground lawfully located by defendants, or their predecessors, there to mingle with the tailings from other companies, then the plaintiffs could not recover.

It would not seem to be true, that the mingling of the tailings from different claims would give a stranger any right to the mixed mass. It may be a circumstance to prove the intention of those who permitted them to be thus mingled so as to show an abandonment. But this is the extent to which such a fact can go. If A can have a right to a place of deposit, B may have, also; and if they can have such right separately, they can mix their property if they please so to do. If parties voluntarily mix their property, this does not give a mere stranger any right to the mixture. The parties hold in common: 2 Blackst. Com., 405.

But this feature in the instruction could do the plaintiffs no injury. If we strike out this portion of the instruction, then the objection would be removed, and still the plaintiffs left in the same position. By the instruction the court required the jury to find two grounds to be true in order to justify the defendants, the last of which was immaterial; but it could only injure the defendants and not the plaintiffs. Whether the tailings were mingled or not, the defendants were entitled to a verdict if the tailings were flown upon their own claims.

The third instruction offered by the plaintiffs was also properly refused. The substance of the instruction was, that a party turning tailings down upon a flat not claimed by him, is presumed to abandon them; but this presumption may be rebutted by other circumstances showing an intention to continue the claim; and the act of the parties in turning their tailings upon unoccupied ground, does not forfeit their right, unless they intend by so doing to abandon.

The place of deposit must be claimed as such, or as a mining claim; and the intention of the claimant must be manifested by outward acts. The rights of others being concerned, the intention not to abandon is not sufficient alone to sustain the right. Although the intention not to abandon the right may

in fact exist, and may be susceptible of clear proof, still the party may fail for want of a clear manifestation of that intent. The instruction placed too much stress upon the intention of the party. The instructions given by the court were better applicable to the facts of the particular case. As an abstract proposition of law, the third instruction was not so far wrong; but its terms were too broad for the circumstances of the case, and might have misled the jury.

There was some contrariety in the testimony. The instructions fairly submitted the question to the jury, and their verdict seems to have been warranted by the testimony.

Judgment affirmed.

BELL v. SCHULTZ ET AL.

(18 California, 449. Supreme Court, 1861.)

[1] **Joint damage by tailings of defendants and others.** Where an injury is caused from the tailings and refuse from a number of mining claims it is allowable to ask a witness as to the effect of throwing in such refuse by defendants "and other miners," leaving it to the cross-examination to bring out the facts and to the instructions to protect the defendant from any responsibility except what he incurred by his own acts.

Appeal from the Fifth District.

Action for damages for destroying portions of plaintiff's dam, and for perpetual injunction against future trespasses.

Plaintiff located a flour mill on Wood's creek in 1854, and had a dam across the creek, above the mill, so as to turn the waters of the creek into a ditch or race dug by him and those under whom he claimed, and leading to and running the mill. Defendants located mining claims on the creek above the dam in 1857, and the tailings, slum, etc., from these claims flowed into the creek and into the ditch of plaintiff. Plaintiff's ditch having become partially filled with slum, etc., he erected in

[1] As to joinder in such cases see *Lockwood Co.* v. *Lawrence*, 77 Me. 297; 52 Am. R. 763; *Little Schuylkill Co.* v. *Richards*, 10 M. R. 661; *McCarty* v. *Boise City C. Co.*, 10 Pac. 623.

July, 1860, a second dam lower down on the creek, so as to turn its waters into his ditch at a point where it was not filled up with the slum. From 1857, to the time plaintiff built this second dam, defendants were able to work their claims; but from about two weeks after its erection, defendants could not work their claims in consequence of the backing up of the tailings, etc., upon their sluice. There was conflicting evidence as to whether plaintiff's dam was the cause of backing up the tailings. The creek between the old dam and defendant's claims had been rapidly filling up for a few years past. Other evidence is immaterial. Plaintiff then offered to show that, in consequence of the filling up of said creek and ditch by the refuse of mining operations, thrown in by defendants and others, it became necessary for him to move his original dam and construct the one lower down, and to this end asked a witness: "What effect did the running in of slum, etc., by defendants and other miners above, have upon plaintiff's race?" Defendants objected to the question, on the ground that they had nothing to do with the acts of other miners, and were not responsible for them. Overruled, defendants excepting; and the witness answered that the effect was to fill up said creek and plaintiff's original race to a large extent, and render it necessary for him to erect another dam lower down the creek, at a point where his race had not been filled up. Other witnesses gave similar testimony, defendants excepting. Verdict and judgment for plaintiff, a perpetual injunction being granted. Defendants appeal.

H. P. BARBER, for appellants.

E. F. HUNTER, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., and COPE, J., concurring.

We do not see any injury done the defendants by the question to which they objected. It is true that the defendants are not responsible for the acts "of the other miners" referred to in the question; but it might have been impossible to assign any specific effect to the individual acts of those who contributed, by the obstructions spoken of, to the general damage

done plaintiff's race. If a dozen men each throw a stone into a ditch, though it may be easy to see what the effect of the whole is on the ditch or the flow of the water, it might be impossible for a witness to answer what was the separate influence of any one stone, or that cast by any one person. The cross-examination would easily bring out the facts, and appropriate instructions from the court would protect the defendant from any responsibility except what he had incurred by his own acts.

Judgment affirmed.

LINCOLN ET AL. v. RODGERS ET AL.

(1 Montana, 217. Supreme Court, 1870.)

Verdict, when not disturbed. Although the preponderance of evidence is against the verdict, yet it will not be disturbed if there is some evidence to support it.

No absolute right to free tailings. The first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, regardless of mining claims of subsequent locators below them.

[1] **Custom of free tailings restricted.** The proof of a custom allowing tailings to run free, will not justify the first locators in allowing their tailings to run so freely as to prevent mining operations below. The doctrine of free tailings can not, without restriction, be maintained.

Location of claim, specially for tailings. Where persons locate ground for the purpose of constructing a flume, they can locate any number of feet not in violation of the mining regulations of the district, and, if there are no regulations, not exceeding a reasonable amount for the deposit of tailings or dump: but the boundaries must be fixed.

[2] **Necessary injuries to lower claims.** Under peculiar circumstances, the first locators, in the reasonable prosecution of their mining operations, might be justified in working some necessary injury to locators below, which injuries would be *damnum absque injuria.*

Appeal from the Second District, Deer Lodge County.

This action was commenced by Lincoln and another in the district court, in April, 1869, to recover $3,000 damages, and enjoin defendants from washing down on plaintiffs' mining

[1] *Esmond* v. *Chew*, 5 M. R. 175; *Nelson* v. *O'Neal*, 4 M. R. 275.
[2] *Hill* v. *Smith*, 4 M. R. 597.

claims, tailings, gravel and sand. The cause was tried at the September term, 1869, by a jury that rendered a general verdict for defendants, and also ten special findings.

The court, KNOWLES, J., refused the motion for a new trial, and plaintiffs appealed.

The facts are stated in the opinion.

CLAGETT & DIXON, for appellants.

WOOLFOLK & TOOLE, MAYHEW & MCMURTRY, for respondents.

SYMES, J.

This was an action brought by plaintiffs, alleging that they were, and had been for two years, the owners of certain mining ground in Lincoln district, Carpenter's gulch, Deer Lodge county, Montana, to wit: six claims next below discovery; that said mining ground had been located for the purpose of mining the same by bed rock flumes; that they had been continually working and mining the same when practicable since location, and had constructed a bed rock flume and a reservoir for harboring the water. Further, that defendants have been for more than a year mining on ground in said gulch, six hundred or eight hundred feet above the plaintiffs', and have been using the water of said gulch through a flume; that in 1868 and 1869, while plaintiffs were in possession of their ground and flume, and waters of gulch, defendants wrongfully and unlawfully washed and run large quantities of rock, tailings, gravel and sediment onto the plaintiffs' ground, and in and upon their reservoir, and covered up and obstructed their reservoir; that plaintiffs had been prevented from mining their ground and had sustained damage to the amount of $3,000, and demanded judgment and an injunction.

Defendants answered, denying the allegations of the plaintiffs' complaint, and alleged that they had located their mining ground above, prior to plaintiffs' location, and that plaintiffs took their mining ground subject to defendants' prior right to let their tailings, etc., run down the natural channel of the gulch. And alleged that there was a custom in the district where said mining ground was situate, that gave those above

in the gulch the right to let their tailings run down the natural channel of the gulch without cribbing the same; and that plaintiffs located their mining ground subject to this mining custom.

The cause was tried at the September term of the Deer Lodge County District Court, judgment rendered for defendants, motion for new trial overruled, and case appealed from order overruling motion for new trial. The facts of the case quite fully appear in statement on motion for new trial and special findings submitted to the jury.

We are asked to reverse the judgment and grant a new trial, first, because the verdict is contrary to law and the evidence; and second, because the court erred in giving and refusing certain instructions.

The jury, in addition to their general verdict for defendants, found, in their special verdict, that defendants located and owned their mining ground above in the gulch prior to plaintiffs' location below and adjoining; that defendants owned three hundred feet of the ground next below the upper line of number one, claimed by plaintiffs, for the purpose of depositing their tailings thereon, and were actually using the same for such purpose when plaintiffs located it with their other ground below; that it was the custom and usage of miners, in the mining district where plaintiffs' mining ground was situate, to let so much of the tailings and sediment as the natural waters of the gulch would carry flow free, at the time plaintiffs located their mining ground; and that the alleged damage accrued by reason of defendants letting their tailings and sediment so run free.

There were other special findings immaterial to the main issues.

The court below states, in reasons for overruling motion for new trial, that it thinks the weight of evidence was contrary to some of the special findings; but that there was some evidence on both sides, as appears in the statement, and therefore the verdict can not be set aside. We think this the correct doctrine: that although the preponderance of evidence may have been in favor of the plaintiffs on the two main issues, viz., whether defendants owned three hundred feet below the upper line of claim number one, for, in miners' parlance,

dump; and whether there was a custom to let tailings run free; still, as there was some considerable evidence on both sides, the judgment can not be reversed for that reason.

This brings us to the consideration and necessary decision of a question, which, after twenty years of mining litigation in California, has never been fairly met and decided, viz.: how far a mining custom to let tailings run free down a gulch without any let or hinderance (such as was found by the jury to exist in this case), can interfere with and destroy the mining operations and ground of persons locating for mining purposes in the same gulch below and after such custom or regulation has been established.

It plainly appears that, if defendants' tailings are allowed to run free, in accordance with said custom, it will entirely destroy plaintiffs' mining ground and render their mining operations valueless. Will the law allow such a custom to take away and destroy the property rights of plaintiffs, acquired as aforesaid, and will defendants' prior location be a good defense under the maxim *qui prior est in tempore potior est in jure?*

The case of *Esmond* v. *Chew*, 15 Cal. 137, is a case in point on question of first in time, first in right, and establishes the doctrine that a person locating ground on the bed of a stream, or in a gulch, prior to one locating ground below, does not acquire the right, by such prior location, to go onto and construct a tail race on subsequently located ground below, and can not, as matter of strict legal right, therefore, allow tailings and sediment to run free, to the destruction of the mining property of junior locators below. Where the useful working of the claim above, with reasonable care and diligence, will necessarily work some injury to the claim below, it would be *damnum absque injuria;* but this would be a question for the jury under the instructions of the court, and can not avail defendants in this case, as it appears that what they justify would entirely destroy the mining property of plaintiffs, and make it impossible for them to work their claims. But this case does not reach the question, how far a local mining custom could authorize a destruction of mining operations below. But the court say that if the damage was justified by a local custom or regulation, its existence should have been alleged and proved; perhaps intimating that such a custom

would justify such damage. The other case cited (*Logan* v. *Driscoll*), where the plaintiff owned mining ground below, and defendants located above, after plaintiff, it was held that the maxim first in time, first in right, applied to this case, and defendant was enjoined from allowing tailings to run down to the damage of plaintiff, defendant being junior locator.

The court below instructed the jury in accordance with the above cited decisions, so far as applicable; but also gave instructions to the effect that, if the defendants proved a custom allowing tailings to run free, that would be a good defense or justification for any damage resulting to plaintiffs' mining operations below; and the case was tried, and judgment rendered on this theory. We think this theory can not be maintained in accordance with strict legal principle. To support this doctrine of free tailings by custom, would be to allow a few miners or flume companies to go into the head of a mining gulch and prevent, perhaps, miles of valuable mining ground below them from being taken up and developed; because no one could tell, if they located below, how soon their ground would be entirely covered up and destroyed, under this custom of free tailings. Such a mining custom would be in contravention of the leading principle that customs must not be inconsistent with the full and rapid development of all the mining resources of the country; for the miners of a district might as well take possession of a large gulch, and establish a regulation that each claim should be five thousand feet up and down the gulch in size, as to put a few flumes in at the head of a gulch, and, under the contended for custom of free tailings, not allow them to be cribbed, and thereby prevent rich mining ground, for miles below, from ever being worked or developed.

We are not, by this decision, restricting any of those mining rights which may be acquired by prior location, or as appurtenant to mining ground, nor contravening the doctrine that the miners may establish such customs and regulations, not inconsistent with the laws of Congress and the territory, as to them may seem just and necessary; but only that the doctrine of free tailings can not be, abstractly, and without restriction, maintained. Where persons locate ground for the purpose of constructing a flume, they can locate any number of feet, not

in violation of the mining regulations of the district, and if there are no regulations, not exceeding a reasonable amount for the deposit of tailings, or dump, but the boundaries of the same must be marked in accordance with the regulations of the district; or, if there are more, by fixing the boundaries by such physical marks as will advertise the precise ground claimed for mining and dump; so that those wishing to locate thereafter may know what is vacant: *English* v. *Johnson*, 17 Cal. 117. And there are other appurtenant rights acquired and necessarily attaching to the claim, defined by the mining law, and the peculiar circumstances surrounding such case. To allow the custom of free tailings to govern without restriction, would be in opposition to this principle, that parties locating are bound to mark the boundaries of their claims, which shall be notice of the extent of the mining ground and rights acquired, to subsequent locators, for all the first locators would have to do would be to pass the mining custom of "free tailings;" then defining boundaries by physical marks would be useless, because if any one located below they could run their tailings onto, and render their ground valueless, and this custom unrestricted would prevent junior locators from cribbing or stopping the tailings from above in any way.

There was evidence in the case to show that if the tailings were not allowed to run free, the defendants' mining operations would be rendered useless, and would be destroyed; but the jury found the defendants owned three hundred feet of the ground claimed by plaintiffs, below their own mining ground, for deposit of tailings. The evidence and peculiar circumstances of the case might justify defendants, in the reasonable prosecution of their mining operations under prior location, in working some necessary injury to plaintiffs, which would be *damnum absque injuria*. But a mining custom which would allow the total destruction of a junior locator's mining operations, in a gulch below prior locators, on ground which was vacant, can not be maintained under any statute or common mining law with which we are acquainted. Therefore, the court erred in instructing the jury that the defendants could justify the destruction of plaintiffs' mining operations by proving a custom or regulation to let tailings run free.

Judgment is reversed and cause remanded for a new trial.

Exceptions sustained.

ROGERS ET AL. v. COONEY.

(7 Nevada, 213. Supreme Court, 1872.)

[1] **Claim held by occupancy—Trespass based on possession.** A party who enters upon vacant public land, makes a survey and record, marks the boundaries of his claim, builds a cabin thereon for storing tools, and continuously thereafter engages in digging and milling the tailings which had been deposited on the land from the quartz mills above, thereby acquires such a possessory right to the land as will enable him to maintain trespass against an intruder who enters upon the land and begins to remove such tailings.

Location of tailings claim. If land be valuable only for the tailings deposited upon it, and it is claimed by neither party for any other purpose, the acquisition of title to it should be governed by the rules ordinarily controlling the acquisition of title or the right of possession to mining claims, which do not demand the same acts as are required to obtain actual possession of agricultural land.

Fencing not necessary to possession of mining claim. Fencing a mining claim would serve no useful purpose except to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to the possession of such a claim.

Tailings an accretion to the land. Where a plaintiff was found to have the possession of certain land upon which tailings were deposited, and defendant to have intruded and removed a portion of such tailings: *Held*, that plaintiff's right to the tailings was co-extensive with his right to the land.

No record, no review. The Supreme Court will not consider questions argued before it, when the facts and proceedings upon which such arguments are based are not brought up in the record.

Appeal from the District Court of the Third Judicial District, Lyon County.

The facts are stated in the opinion.

R. M. CLARKE, for appellant.

Plaintiffs did not comply with the requirements of the possessory act, nor did their acts constitute a possessory right: *Sunol* v. *Hepburn*, 1 Cal. 262; *Kile* v. *Tubbs*, 23 Id. 431; *Coryell* v. *Cain*, 16 Id. 567; *Garrison* v. *Sampson*, 15 Id. 95; 21 Id. 454; 32 Id. 15; *Sankey* v. *Noyes*, 1 Nev. 68; 2 Id. 280; *Stainінger* v. *Andrews*, 4 Id. 59; *Robinson* v. *Imperial Co.*, 5 Id. 44. Before deposited on the land the tailings were personal property: 11 Cush. 11; 5 Nev. 81.

[1] *Patchen* v. *Keeley*, 14 Pac. 347.

ELLIS & KING, for respondents.

The ground was valuable only for the tailings upon it. It was not necessary to fence: *McFarland* v. *Culbertson*, 2 Nev. 282; *Whitman Co.* v. *Baker*, 3 Id. 387.

By the Court, LEWIS, C. J.

Trespass for entering upon a tract of land and removing therefrom certain tailings claimed by the respondents. The judgment below was for the plaintiffs, awarding to them $800 damages, and enjoining the defendant from a repetition of the acts complained of. The learned judge below found that upon the twenty-first day of March A. D. 1870, the plaintiffs entered upon the land in question, which is a long narrow tract, upon which the tailings were deposited; caused a survey thereof to be made and recorded, and marked the boundaries by red posts firmly set in the ground at each corner, and one in the center of the south boundary line; that continuously thereafter they have been engaged in digging up, hauling away, and milling the tailings deposited thereon; that in August A. D. 1870, they built a small cabin within the boundaries designated, using it for storing the tools employed by them on the premises, and for other purposes; that they had applied to the proper State authorities to purchase a portion of the land; deposited the consideration therefor, and also received from the Central Pacific Railroad Company a contract whereby it agreed to convey to them the residue as soon as it should receive a patent therefor from the government, the land being within a section granted to that corporation by the act of Congress of July 1, 1862. On the seventh day of December, the defendant entered upon the land and began to remove the tailings, and before the suit was brought had removed about two hundred tons, valued at four dollars a ton. Shortly after his entry upon the premises, he also made application to the State to purchase that portion of the land upon which the trespass was committed. Neither he nor the plaintiff, however, had acquired any title thereto from the State at the time of trial. The claim which he made to the land, years before the time of this trespass, appears to have been abandoned, and is there-

fore of no weight in this case. The court finds also that the land in question was utterly useless, and of no value except for the tailings deposited on it.

This is also admitted by the parties. No title to the tailings is claimed by either party, beyond that which may have been acquired by the attempts to obtain title to the land upon which they were located, or their actual reduction to possession, they having been brought down in the stream from the quartz mills above, and deposited on the land in question by the water running over it, forming a stratum upon its surface, and becoming a part of the soil itself. The question then is, which of these parties had the best right. As the trespass does not seem to have been committed on that portion of the land agreed to be conveyed by the Central Pacific Railroad to the plaintiffs, and as neither party appears to have acquired any title from the State to that portion upon which it was committed, what right or title the plaintiff acquired by means of this contract with the Central Pacific Railroad, and from the State by the application to purchase, and the deposit of the purchase money, may be left out of the case. Let us ascertain, then, what right he had, independent of these facts.

It must be borne in mind throughout the case, that in an action of trespass it is only necessary for the plaintiff to prove a rightful possession in himself; it is not incumbent on him to establish any title beyond that. The right of property may be either in the government or a third person. In either case where the controversy is between persons neither of whom claims the real title, the question turns simply on the best right of possession. The plaintiff, therefore, in such action, is only called upon to prove that the property was rightfully in his possession as against the defendant at the time of the acts complained of, and that the defendant committed the injury. Does the proof in this case bring the plaintiffs within the rule? It is argued not; that they had acquired no such possession of the land in question as to entitle them to its possession as against the defendant.

It is admitted by the parties, and so found by the court below, that the land in question is of no value, except for the tailings, and that they are valuable only for the gold and silver which they contain. So it is manifest from the evi-

dence that neither plaintiffs nor defendant claimed the land for any purpose except that of securing such tailings, in other words, it is claimed by them for mining purposes only. Although not a mining claim, within the strict meaning of the expression as generally used in this country, still it is so closely analogous to it that the propriety of subjecting the acquisition and maintenance of the possession of it to the rules governing the acquisition of the right of possession to a strictly mining claim, at once suggests itself.

The only value attached to the land results from the precious metals which may be obtained from it. What the difference how these metals may have been deposited there, so far as a case of this kind is concerned? It is distributed through a certain stratum of earth, which must be dug up and put through a certain milling process, as in case of any ordinary metalliferous earth. If the land be valuable only for the metal which it may contain, and it is claimed by neither party for any other purpose, the acquisition of title to it should manifestly be governed by the rules ordinarily controlling the acquisition of title or the right of possession to mining claims. We do not pretend to hold the land here in question to be mineral land, but only that it is so clearly analogous thereto that the laws controlling the possession of one should also govern the other. Under those rules the plaintiffs had an undoubted possession, sufficient to enable them to maintain trespass against any person entering within their boundaries, except such as would show a better right. It is the suggestion of justice and the clearest reason, that the same acts which are required to enable a settler to obtain actual possession of pasture or agricultural land, should not be demanded where the claim is only of mining ground. In the first case, fencing is often indispensable to completely subject the land to the purposes for which alone it is useful. Hence, it is generally held that such acts must be performed as will bring it within this rule of utilization. But fencing a mining claim would be an utterly useless act. It would in no wise improve its value, and would often be a mere incumbrance; it would not in the remotest manner further the purpose for which alone the land is valuable. The rule requiring fencing and improvement is a rule of utility, requiring the land to be sub-

jected to the purposes for which it is useful; but the reason for requiring such improvements in respect to agricultural lands has no application to a mining claim, nor to land like this, which is valuable only for mining purposes. It has, therefore, been uniformly held that fencing is not necessary; that to do so could serve no purpose except to mark the boundaries; and any other means which will accomplish that object will equally answer the requirements of the law. Thus in *English* v. *Johnson*, 17 Cal. 107, the court decided that possession taken of a mining claim without reference to mining rules, was sufficient, as against one entering by no better title, to maintain an action; and that such possession need not be evidenced by actual inclosure, but if the claim be included within distinct, visible and notorious boundaries, and if a portion of it is worked within such boundaries, it is sufficient against one entering without title. So it was held that going on land to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it, as starting a tunnel a considerable distance off to run into the claim, is a sufficient possession of the claim. Say the court: "The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims, we require no other acts as evidence of possession than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of the ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. Going on the land to work it, or even work done in proximity, or preparing to extract minerals from it, as for example, starting a tunnel a considerable distance off to run into the claim, would be a possession of the claim within the meaning of the rule. * * * But we think where a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on, or of, a part, and though the party does not enter in accordance with mining rules or under a paper title. The rule which applies to agri-

cultural land, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the extent of the claim than those physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion." This doctrine was affirmed in *Table Mountain Co.* v. *Stranahan*, 20 Cal. 199, and again in *Hess* v. *Winder*, 30 Cal. 349, and is clearly the doctrine always recognized in this State.

It does not seem to be questioned but the plaintiffs had designated the boundaries of this claim by distinct physical marks. They had placed large posts painted with a red color at its several corners, and also an additional one in the center of the south line. But as there appears to be no question in the case as to the fact that the boundaries were marked by distinct visible monuments, it is unnecessary to discuss the question further. Their possession was, therefore, all that was required, and was sufficient to enable them to hold and protect it. With this view of the case it is unnecessary to decide what right or title, if any, the plaintiff acquired by means of the contract with the railroad company. Nor can it be claimed that the defendant acquired any right or title to the tailings gathered together, or, as it is claimed, severed from the land by him whilst the plaintiffs were in the rightful possession of the premises, for their right to the tailings was co-extensive with their right to the land And as we have shown they had such right and possession at the time of the entry of defendant, they had an equal right to and possession of the tailings.

The only remaining question argued in this court arises out of the action of the court below in placing a receiver in possession of a certain quantity of the tailings, removed in violation of a restraining order, and subsequently adjudging the title to the same to be in the plaintiffs. None of the proceedings had in the appointment of the receiver, and none of the evidence touching the removal of the property in violation of the order of court, appear in the record. Under such circumstances this court does not feel warranted in attempting a

review of the action of the court below, as it would be compelled to do so with no satisfactory information of the facts upon which its action was taken. However, if we were allowed to act upon the facts as related in the brief of counsel for appellant, we should not hesitate in holding that the court below was fully justified and warranted by the law in summarily restoring all property to the plaintiff which it was found upon the final hearing belonged to him, and which had been removed or taken possession of by the defendant in contempt of an order against him enjoining any such interference with it.

Judgment below must be affirmed, and it is so ordered.

GREGORY ET AL. v. HARRIS ET AL.

(43 California, 38. Supreme Court, 1872.)

[1] **Right to run tailings through another's flume.** A party mining upon a ravine which runs into another ravine is not clothed, by virtue of his right, to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in, at any point he may select, upon the tail-race of another constructed upon the other ravine.

Appeal from the District Court of the Second Judicial District, County of Butte.

In an action to enjoin the defendants from using the plaintiffs' tail-race, judgment was rendered for the defendants. The plaintiffs moved for a new trial. The motion was denied, and they appealed from the judgment, and from the order denying the motion for a new trial.

The other facts are stated in the opinion.

HAYMOND & STRATTON and Jos. E. N. LEWIS, for appellants.

GEORGE CADWALADER, for respondents.

By the Court, WALLACE, J.

[1] *Riborado* v. *Quang Pang M. Co.*, 6 Pac. 125.

The mining grounds of the plaintiffs are near "Campbell's Ravine," those of the defendants lying southerly, and near "Anderson's Ravine." The general course of Campbell's Ravine is rather westerly, and that of Anderson's Ravine southwesterly, until the latter empties into the former, after which both run into "Sawmill Ravine," still further in a westerly or southwesterly direction. The controversy arises out of the conflicting claims of the litigants, respectively, to the use of these ravines, "Anderson's" and "Campbell's," so called, as means of carrying off the tailings from their respective mining grounds.

The plaintiffs had constructed a cut, flume and tail-race, which, running along the general course of, and near to, Campbell's Ravine, crossed it twice; the defendants afterward dug a cut, some eight feet in depth, which, starting from a tunnel of theirs and not running along the general course of Anderson's Ravine to, or near to, its mouth, but turning rather sharply to the southward, struck the tail-race of the plaintiffs at a point some three hundred yards above, where Anderson's Ravine naturally debouches into Campbell's Ravine; and through a flume laid in this cut the defendants pour their tailings into the race of the plaintiffs. These facts, by their mere statement, dispose of the principal defense upon which the defendants rely to justify their appropriation of the plaintiffs' flume and tail-race. The defendants say, in substance, that their mining claims are situate on Andersons' Ravine; that the "*natural outlet*" for their tailings is through that ravine into Campbell's Ravine, which they, therefore, have the right to follow over and through any flume or other structure erected by the plaintiffs, upon the line of this "natural outlet;" but the answer is, that even if this claim to follow the "natural outlet" be conceded, and the consequent right to use the race of the plaintiffs, at the mouth of Anderson's Ravine, be thereby established, it clearly does not clothe them with the general right to break in upon the tail-race of the plaintiffs at any point the defendants may select along its entire line—even as here, at a distance of three hundred yards above the "natural outlet," which they claim.

Judgment reversed and cause remanded.

Mr. Justice RHODES dissented.

ROBINSON ET AL. V. THE BLACK DIAMOND COAL CO.

(50 California, 460. Supreme Court, 1875.)

Letting loose sediment down on neighbor's land. Where a party engaged in coal mining allows water, clay and sand to descend in a flowing mass upon the below-lying land of another so as to destroy its value for cultivation, and such descent is the direct result of the act of such party, and not the mere result of the law of gravitation, the person whose land is thus injured may recover damages, and enjoin the future commission of said acts.

Human agency aiding natural causes. That water will naturally descend is entirely consistent with its descent being so controlled or directed in a particular instance by accountable human agency as to work an injury to lands lying below, which would not otherwise have resulted.

Appeal from the District Court, Fifteenth Judicial District, County of Contra Costa.

The complaint averred that the plaintiffs, on the 23d day of September, 1871, were and now are the owners of a tract of land known as the "Los Medanos Rancho," in Contra Costa county, and that, on the same day, the defendant was in possession of a tract of land situated about three miles in a southerly direction from the rancho, which then was and since had been used by the defendant for mining coal, and that, in the conduct of its business of mining, the defendant at said date and ever since had caused to be discharged, etc. The remainder of the allegation is found in the opinion. It was then alleged that the plaintiff had demanded of defendant to abstain from said acts, but the defendant had neglected to comply. Judgment was asked for damages and that the defendant be enjoined. The plaintiff appealed.

The other facts are stated in the opinion.

EDMUND L. GOOLD, for the appellant, argued that the defendant had a right to carry on mining, but it was not a part of that business to cast pernicious compounds onto the plaintiffs' land, and that the complaint excluded the idea that

[1] S. C. on second appeal re-affirming same points: 57 Cal. 412; 40 Am. R. 118; *Penn. Coal Co.* v. *Sanderson*, 11 M. R. 79. And see *Woodyear* v. *Schaefer*, 57 Md. 1; 40 Am. R. 419; *Canfield* v. *Andrew*, 54 Vt. 1.

the destruction of the soil was the legitimate consequence of mining, or the result of the operations of the laws of nature, and cited *Logan* v. *Driscoll*, 19 Cal. 623; *Jones* v. *Festiniog Railway Co.*, Law Rep., 3 Q. B. 736; *Baird* v. *Williamson*, 15 C. B. N. S. 388; *Smith* v. *Kenrick*, 7 C. B. 515; *Fletcher* v. *Rylands*, L. R. 1 Ex. 277; 1 Domat, Cush. Ed. 1861, Art. 1583.

W. H. L. BARNES, for the respondent, argued that the complaint did not charge the defendant with any willful or malicious act, and that the flow downward was the result of natural laws, and that it did not therefore state a cause of action, and cited *Gibson* v. *Puchta*, 33 Cal. 310.

BY THE COURT.

The plaintiffs allege that the defendant, in working its coal mine, caused to be discharged upon the lands of the plaintiffs, lying below, a large quantity of the refuse of the product of the mining ground—a large quantity of water, as also of the smaller and finer portions of the coal, together with sand and clay and other refuse mixed with water—the whole forming a flowing mass, which the defendant compelled and still compels to descend upon the land of plaintiffs, covering it to the depth of one foot and upward, rendering it incapable of profitable vegetation, and wholly useless to the plaintiffs. At the trial, the plaintiffs in opening the case, having read the complaint and stated that they expected to prove the facts therein alleged, were, on motion of the defendant, nonsuited. We are of the opinion that the court below erred in nonsuiting the plaintiffs. As we understand the complaint, the invasion of the plaintiff's premises was not the result of mere natural causes. The water charged with the refuse matter of the defendant's mine did not descend upon the land of the plaintiffs in its natural course of descent, nor as the mere result of the law of gravitation; it is distinctly alleged in the complaint, on the contrary, that the defendant *compelled* its descent upon the property of the plaintiffs. The damage done to the lands below is, upon the allegations in the complaint, the direct result of the acts of the defendant. It is argued by the counsel for

the respondent that, notwithstanding it is distinctly alleged in the complaint that the defendant "compelled" the water to descend in the manner complained of, the allegation is without significance in view of the fact that water descends in obedience to natural laws, and, therefore, that it "savors slightly of the absurd" to allege that in this instance the descent was the result of the acts of the defendant. But we see no force in this suggestion. That water would naturally descend is entirely consistent with its descent being so compelled, controlled or directed in a particular instance by human agency as to work an injury to lands lying below, which would not otherwise have resulted.

If damage resulted to the plaintiffs as the direct consequence of this interference of the defendant under circumstances which do not authorize or justify such interference on its part, the defendant is liable.

The plaintiffs having been nonsuited upon reading their complaint, the evidence is of course not found in the record, and we can not anticipate what the circumstances may turn out to be; but whatever they may prove to be, there is no such defect in the complaint as would support the judgment of nonsuit rendered below.

Judgment reversed and cause remanded for a new trial.

KEYES V. LITTLE YORK GOLD WASHING AND WATER CO.

(53 California, 724. Supreme Court, 1879.)

[1] **Common result of mingled tailings.** The complaint stated that the defendants were miners, severally engaged in hydraulic mining, the several mining properties of defendants lying within a radius of seven miles upon the hilltops adjacent to Bear River; that the tailings of the several mining claims were swept down the river and deposited upon the lands of the plaintiff so as to destroy their value. It prayed an injunction restraining the flow. The defendants demurred on the ground of a misjoinder in that it did not appear by the complaint that the defendants jointly committed any of the acts complained of: *Held*, that the demurrer was well taken.

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[1] *Bell* v. *Schultz*, 14 M. R. 77.

Idem—Basis of the holding. There is no principle of equity which would make a person responsible for a wrong that he has neither done nor threatened to do.

[1]**No joint action, no joint responsibility.** If the acts and threats of a person taken by themselves do not make a case which would support an action against him, his mere joinder in an action as a defendant with others who have severally, and without concert or collusion with him, done similar acts or made similar threats, will not create a liability on his part.

The cases governing the joinder of parties considered, and *held*, that where an action for a tort is brought against several co-defendants, it is essential that the wrong complained of be joint.

Appeal from the District Court of the Tenth Judicial District, Sutter County.

Defendants appealed. The facts are stated in the opinion.

S. M. WILSON, W. C. & I. S. BELCHER, J. K. BYRNE and A. B. DIBBLE, for appellants.

GEO. CADWALADER, P. VAN CLIEF and J. H. BRADDOCK, for respondent.

BY THE COURT.

The complaint sets forth that the plaintiff is the owner of certain described premises known as bottom land, situate in the valley, upon the banks of Bear river, about ten miles from where that stream debouches into the Sacramento valley, and midway between that point and the mouth of the river; that the defendants are miners severally engaged in hydraulic mining at points high up on Bear river and its tributaries—the several mining properties of the defendants lying within a radius of seven miles upon the hilltops adjacent to the river, and being severally wrought and carried on by the respective defendants, and that the several dumps used by the defendants

[1]See this case commented on in *People* v. *Gold Run Co.*, 66 Cal. 149, by a new bench. The manifest distinction between holding A, B and C to a joint responsibility for the total effect of the sum of the acts of each, and refusing to allow either to escape his several responsibility, on the ground that others were doing a like wrong, as recognized in the text, is discarded in the latter case. See Note 9, *post*, p. 102.

respectively in their mining pursuits are some of them in the bed of the river, others in the beds of steep ravines and gulches immediately contiguous to and leading into the bed of the river and its tributaries; that the tailings of the several mining claims deposited on these dumps are swept down the river by the force of the current until they reach the lands of the plaintiff below, upon which they are deposited, and which they cover so as to destroy the value of the said lands. The prayer is that an injunction issue enjoining the defendants from depositing the tailings and debris of their several mining claims so that they reach the channels of the river, etc.

The defendants appeared to the action, and filed a demurrer to the complaint upon several grounds—and, among others, upon the ground that there is a misjoinder of parties defendant, in that it did not appear by the complaint that the defendants jointly committed any of the acts complained of, or are acting therein in concert or by collusion with each other, but that, on the contrary, it did appear by the complaint that the defendants had no interest in common in the subject-matter of the suit, but were acting severally and without any joinder or co-operation on the part of the defendants, or any of them. The demurrer was overruled by the court below, and the propriety of its action in that respect is brought in question by this appeal.

An injunction is granted when the relief sought consists wholly or in part of restraining the commission or continuance of acts being done or threatened, or when the commission or continuance of acts during litigation will produce irreparable injury, or render a judgment in plaintiff's favor ineffectual: Code of Civil Procedure, Sec. 526. The injunction ordered at the final hearing by the court below was not auxiliary to any other provision of the decree, or added to render some other final order more effective. It was the only decree sought by plaintiff, and is the very most that the allegations of his bill would have entitled him to had the defendants been charged with co-operation, and a common design in doing that which each threatened.

There are, indeed, recitals in the complaint alleging plaintiff to have already sustained damages, but no relief is sought upon them as allegations constituting the basis for a decree.

They are rather in the nature of statements of evidence tending to sustain the averments that like damages will occur in the future, unless defendants are restrained. In the case of a demurrer for misjoinder (even had damages for past injuries been demanded in this case) no judgment for damages could have been rendered against the defendants *jointly*, because they are charged each to have committed a tort severally; and several judgments for damages could not have been rendered against each defendant, in the same action, for such judgments would have demonstrated a misjoinder.

No damages are claimed in the prayer for judgment or in the "points" of counsel. The wrong complained of is that each of the defendants, acting for himself, and not in collusion or combination with any other, threatens to continue to deposit the tailings from the working of the mine in such position, on or adjacent to his own premises, as that, from natural causes, they will flow down, or be forced down upon plaintiff's farm.

If a nuisance was created by the exposure of the dumps to the action of the waters of Bear river and its tributaries, a nuisance was committed by each of defendants, when he—disconnected from the others—made or threatened such deposit; or, if it be said that the matter of the *reasonable use* of the stream can enter into the inquiry, there could be no nuisance by any of the defendants who had made only a reasonable use.

In either view of the case, there is a misjoinder of parties defendant. The bare statement would seem to prove the proposition, since the very essence of the objection of misjoinder of a defendant with others is that he is not connected with or affected by the single cause of action, if there is but one, or that he is not connected with or affected by one or more of several separate and distinct causes of action, if several are alleged. If any one of these defendants was liable to be enjoined, he could have been enjoined in a separate suit, the subject-matter of such suit being the alleged threatened wrong. If any one of the defendants is not liable to be enjoined in a separate suit, he can not be made liable in an action like the present; for there is no principle of equity which would make a man responsible for a wrong which he has neither done nor

threatened, merely by joining him with other defendants who may independently have threatened a similar wrong.

Several cases were cited by counsel for respondent which it was claimed would sustain the joinder of the defendants in this action, but an examination will clearly distinguish them from the present. *Mayor of York* v. *Pilkington*, 1 Atk. 282, was a bill of peace to prevent a multiplicity of suits. In a certain sense, all bills of peace are intended to prevent multiplicity of suits, but it is a *non sequitur* to assert that wherever the result of assumed jurisdiction by a court of equity will relieve the plaintiff of the inconvenience of bringing several separate actions at law or suits in equity, the complaint is to be termed a bill of peace. In *Mayor* v. *Pilkington*, a bill was *brought to quiet the plaintiffs in a right of fishery* in the River Ouse, of which *they claimed the sole fishery* "of a large tract" against the defendants, who, it was suggested by the bill, *claimed several rights*, either as lords of manors or occupiers of adjacent lands. The main question was whether, in view of the fact that there was no privity between the defendants, the bill could be maintained. Holding the affirmative on this proposition, the court of chancery was authorized to retain the cause for other purposes. But the gravamen of the bill was not that the defendants were several and separate trespassers, (the view upon which the demurrer was sustained at the first argument) but was that the plaintiff had an exclusive right against which defendants were asserting adverse rights. The proceeding was analogous to our action to quiet title. The present case more resembles *Dilly* v. *Doig*, 2 Vesey Jr., 486, in which the proprietor of a copyright sought to restrain in the same suit several and independent infringements of his right by different persons In that case there was no allegation in the bill of a claim of right on the part of the defendants to sell copies of the spurious edition of the book, and, from the nature of the circumstances detailed, there could have been no such allegation. The defendants were alleged to be severally wrong-doers without any combination. The Lord Chancellor said: "The right against the different booksellers is not joint, but perfectly distinct; there is no *privity*." The subject-matter of the bill was a wrong done by each of the booksellers; its object was, not to obtain a final determination

that the plaintiff had the exclusive right, and that the defendants had no right (for it was not asserted that they claimed any) but, as in the present case, simply to enjoin wrongs threatened by the defendants severally, and not *jointly*. In *Whaley* v. *Dawson*, 2 Schoales & L. 367, a demurrer was *sustained*, "for that it appeared by said bill that the same was exhibited against defendants and one Michael Carraher for several and distinct matters and causes that have no relation or dependencies on each other." In *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 137, Chancellor Kent remarks: "There was a series of acts on the part of the persons concerned in the 'Genesee Company,' all produced *by the same fraudulent intent*, and terminating in the deception and injury of the plaintiff. The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes." All the defendants (except such as were parties necessary to the final determination of the issues between plaintiffs and those who had taken part in the fraud) had been actors in a greater or less degree in carrying out the common fraudulent design. The case would have been more analogous to the present, if here the several defendants had been charged with threatening the injury in pursuance of a purpose adopted by a common agreement. It is claimed that *New York R. R.* v. *Schuyler*, 17 N. Y. 603, 34 N. Y. 45, is strongly in point. But that was a case where the plaintiffs claimed a right to have certain stock canceled as having been fraudulently issued, and the defendants, as the complaint alleged, "all claimed rights; * * * all asserted a claim upon the company in some form." 17 N. Y. 594–5. The case was determined upon its analogies to a bill to *quiet title* and *remove a cloud*. The learned judge likened it to a case of an individual clothed with the legal title to the railroad property, receiving its gross earnings for the purpose of dividing the net profits among a large number of individuals whose rights were evidenced by certificates of stock. In such case, if a new class should come forward claiming the same rights, and presenting instruments of the same kind as the certificates, bearing on their face all the evidences of genuineness, but in fact unauthorized and spurious, it would be the right and duty of the *legal owner* (upon settled principles of equity) to call

the false claimants into court in order to remove the cloud upon the equitable interest of those whom he represented: Ibid. 598.

It is unnecessary to dwell upon the analogies between the cases of *N. Y. R. Co* v. *Schuyler*, and *Mayor of York* v. *Pilkington*, or on the very marked differences between the former and the case at bar. In the Court of Appeals, 34 N. Y., the complaint was expressly characterized as "a bill of peace, to quiet titles, settle rights and prevent a multiplicity of suits." An examination of *Thorpe* v. *Brumfit*, Law R., 8 Ch. App., shows that the parties all had a contract relation to each other, by reference to which their respective rights were to be determined; and further, that no question of joinder was raised, but, on the contrary, the defendants *all answered together*, insisting that they all had a certain right of way, to be exercised in a reasonable and proper manner (p. 653). In *People* v. *Morrill*, 26 Cal. 336, the objection was that there was a misjoinder of plaintiffs. It was held (and apparently admitted) that all the plaintiffs were properly joined, so far as relief by cancellation of the patent was concerned, and it was said that the demurrer should be overruled because too general.

We think the distinction between the case at bar and the other American cases cited by the respondent, *Gaines* v. *Chew*, 2 How. 619, amongst them, is equally susceptible of explanation. With respect to the Scotch cases, it is enough to say that, under the system of law which obtains in Scotland, it would appear that parties and causes of action may be united in a manner not permissible in countries where the common law prevails; the inconveniences and evils resulting from the joinder of parties without community of interest being there avoided by a system which allows the "conjunction" of causes and the submission of special issues to the triers of fact.

At *law*, where an action for tort is brought against several co-defendants, it is essential that the wrong complained of be joint: Dicey on Parties, 449. This rule is thoroughly understood, and is not disputed. If there are any exceptions in equity they have not been called to our attention. We are convinced that none can be found which will authorize the joinder of defendants attempted in the proceeding before us. We have no doubt that the objections to the complaint above

considered could properly be presented by a demurrer on the ground of misjoinder of parties defendant.

Judgment and order reversed and cause remanded, with directions to the court below to sustain the demurrer to the complaint. Remittitur forthwith.

1. Easement to discharge ore mud upon "meadow lot" extended to land not described: *Bushnell* v. *Proprietor of Ore Bed*, 3 M. R. 258.

2. No action lies for diverting water from a ditch so filled with tailings that it could not transport water: *Brown* v. *Smith*, 4 M. R. 539.

3. In trespass for depositing tailings under code pleading, the words, "with force and arms broke and entered," are surplusage: *Darst* v. *Rush*, 14 Cal. 81.

4. Pleading, in actions for flowing tailings: *Wood* v. *Richardson*, 12 M. R. 121.

5. Dam obstructing tailings abated as a nuisance: *Stiles* v. *Laird*, 11 M. R. 21.

6. The question whether a patentee of mining lands has the right to flow tailings is not such a question as will allow the federal courts to take jurisdiction: *Little York Co.* v. *Keyes*, 96 U. S. 199.

7. The right of lower claimants to dam tailings from claims above: *Nelson* v. *O'Neal*, 4 M. R. 275.

8. Easement of prior claim to flow tailings on ground afterward located below: *O'Keiffe* v. *Cunningham*, 9 M. R. 451; *Esmond* v. *Chew*, 5 M. R. 175; *Logan* v. *Driscoll*, 6 M. R. 172.

9. For the rulings enjoining hydraulic mining under the plea of stopping the filling up of the river beds and the destruction of the meadow lands in what are known as the Debris Cases, see *Woodruff* v. *N. Bloomfield Co.*, 18 Fed. 753; 27 Id. 795; *Hardt* v. *Liberty Hill Co.*, 27 Fed. 788; *Golden Gate Co.* v. *Superior Court*, 65 Cal. 187; *People* v. *Gold Run Co.*, 66 Cal. 138; *Hobbs* v. *Amador Co.*, Id. 161. The evil from which relief was sought in these cases was doubtless great and their general result may have been right. But certain incidents in their progress detract from their force, as a final adjudication upon proper principles and by due process of law. They are candidly styled by Sawyer, J., "a suit between the mining counties and valley counties." 18 Fed. 792. That an injunction against flowing tailings was not an injunction suspending "the general and ordinary business" of the hydraulic company, and would therefore be granted *ex parte* without regard to the statute prohibiting injunctions of such effect, without notice, is an instance of special pleading too obvious to be justified: 65 Cal. 189; 66 Id. 314. The continued prevention of mining after defendants had built their impounding dam (27 Fed. 788,) extending the inhibition to drift mining (27 Fed. 795,) and the imposition of heavy fines paid over to complainant's solicitors (Id.), show the dangerous limits to which judicial power may be extended.

THE STATE (THE DICKERSON SUCKASUNNY MINING CO., Prosecutor,) v. DICKERSON, Collector of Randolph Township.

(25 New Jersey Law. 427 Supreme Court, 1856.)

Salable value. The law requires all property to be assessed for taxation at its actual value; the amount it will sell for at public sale made under authority of law is a good *prima facie* criterion of such value, and will not be overcome by a valuation made by an assessor, with the consent of the owner, in a previous year.

The income of property is no criterion for an assessor, in making a valuation.

Comparative valuation, no test. If other lands in a township are assessed much below their value, it is no ground for setting aside an assessment made upon a correct valuation; but the remedy of the latter is to appeal from his assessment, and at the same time apply to the commissioners of appeal to raise such assessment as may be too low.

Where an assessment is reduced by the commissioners of appeal, the assessment merges in the judgment of the commissioners; and in the absence of any evidence that the amount fixed by the commissioners is too great, the court will not interfere.

Certiorari to commissioners. If a person against whom an assessment is made make an affidavit before the commissioners of appeal to what he believes to be the true value, and the commissioners refuse to make a corresponding reduction, relief can be obtained in this court by *certiorari*.

Reduction, pro tanto. If more tax is assessed than authorized by the proper authorities, the assessment will be set aside to the extent of such excess, and each person against whom an assessment is made will be entitled to a reduction, in proportion to the amount of his assessment.

Certiorari in matter of taxation.

VANATTA and WHELPLEY, for plaintiffs.

C. S. GREEN, for defendant.

RYERSON, J.

The prosecutors in this case complain of an assessment of taxes made in the year 1854, upon their lands in the township of Randolph, Morris county. They were assessed for 284

acres, valued by the assessor at $211,500, and for personal property valued at $500, in all $212,000, the sum assessed being $890.40. From this assessment they appealed and the commissioners of appeal, after hearing evidence, reduced it to $597.60.

They complain that the assessor adopted an erroneous principle in fixing a valuation upon their lands, and rated them greatly beyond their actual value; they also complain of the judgment of the commissioners of appeal, on the ground that it was an arbitrary judgment, given by way of compromise, and not founded on any valuation put by them upon the property.

It appears from the evidence that Mahlon Dickerson, who died in the fall of 1853, owned, at his death, the lands in question; that the devisees of his real estate are the stockholders in this company, and that the lands taxed were bought by the company at public sale in the spring of 1854, for $211,500, they having been run up to this price by the competition of another bidder; it further appears that for three years next preceding his death he was assessed by the same assessor for these and other lands, in all 412 acres, at a valuation fixed by his (Dickerson's) consent at $75,000, and the assessor testifies that he does not consider these lands intrinsically worth any more in 1854 than they were during those three years, and that his only reason for valuing them in that year at $211,500, was the fact of the public sale to the prosecutors at that price.

The principal value of the lands consists in the mines of iron ore found upon them; the assessor values them, excluding the mines and including the buildings, at from $150 to $200 per acre, making a total varying from $42,600 to $56,800. Another witness, whose means of forming a correct opinion seem superior to those of the assessor, values them at $30,000, exclusive of the mines.

To ascertain the additional value by reason of the mines, some evidence was given of the quantity of ore raised per year for several years last past, the cost of raising and the price per ton after being raised; but this evidence was too indefinite, even if the annual production was the true legal criterion of value, to warrant the conclusion that the lands are not worth the sum at which they were sold to the prosecutors. Besides

it has been decided by this court, in the case of *State* v. *Platt*, 4 Zab. 108, that "the income is not the criterion."

It further appears that there are six other mining properties in the same township, valued by the same assessor, in 1854, at $68,500, and the evidence satisfactorily shows that the lands in question are not worth more than these other mining properties, and perhaps not so much.

No one of the witnesses, however, has testified that in his opinion these lands are not worth the sum at which the assessor valued them, nor has any one fixed any precise value, nor does it appear that there was any such evidence before commissioners of appeal.

It was insisted that the assessor, in regulating his valuation entirely by the amount for which the property sold, adopted an erroneous principle. The law requires all taxable property to be assessed at its actual value (Nix. Dig. 801, § 59), and I know of no better *prima facie* criterion of the actual value of property than the amount it will sell for at a public sale made under authority of law as this was. This principle has been recognized in the cases of *State* v. *Danser*, 3 Zab. 552, and *State* v. *Tunis*, Id. 543. Such a sale is not, however, conclusive of the value, even as against the purchaser, although strong presumptive evidence against him; the presumption may be overcome, but it has not been in this case.

The much lower valuation put upon this property by the same assessor in the three previous years, and the valuation of $68,500 put by him in the same year upon the other mining properties in the same township, which are proved to be worth in the aggregate as much as this, were strongly urged as furnishing sufficient evidence that this property was overvalued; but such a conclusion by no means follows. Although in those three years it was valued at less than $75,000, yet the valuation was fixed by the consent of the owner, and everybody understands that in such cases the owner, as a general rule, endeavors to fix it as low as possible, and where he and the assessor agree they generally put it much below its actual value. Besides, even if they estimated it at what they believed to be the actual value, they might have been mistaken, and such would be the natural inference from the purchase by the prosecutors, standing unexplained, and nothing shown by the

evidence to distinguish it from any other ordinary purchase at public sale; at all events this previous valuation can not overcome the presumption arising from the sale.

The other mining properties may have been and doubtless were undervalued; there is evidence that the owner of one of them rated by the assessor at $25,000 valued it at over $50,000; and although by rating the lands of the prosecutors at their actual value, and the other lands in the township much below such value, great injustice may have been done by imposing upon them more than their just share of the taxes, yet that furnishes no ground for setting aside the assessment. The remedy for such injustice is to appeal from the assessment against themselves, and at the same time apply to the commissioners of appeal under the act of March 9, 1848 (Nix. Dig. 801, § 57), to raise such assessments as may be too low; by the provisions of that act, and of the 49th section of the act of 1846, the commissioners could examine all the assessments made in the township, and after ascertaining the total value of the taxable property, could apportion the taxes to be raised ratably, upon all, raising some and reducing others, as from the evidence before them might be agreeable to the principles of justice.

In the case of *State* v. *Platt*, 4 Zab. 108, church property of the value of $100,000 not exempt from taxation, was omitted entirely by the assessor, and the omission was urged as a ground for setting aside the assessment, but the objection was not sustained; the principle settled in that case applies to this. In taking the amount for which the property sold as the standard of its value, the assessor did not adopt an erroneous principle, neither will the evidence warrant the conclusion that this was above its actual value.

But whether this assessment was too high or not, or made upon an erroneous principle or not, it was reduced by the commissioners of appeal, and merged in their judgment. They reduced it from $890.40 to $597.60, which, at the same percentage, would reduce the valuation from $211,500 to about $141,786; it does not, however, appear upon what evidence they acted in making the reduction.

The argument of the prosecutors is that the fact of the original assessment having been reduced by the commissioners

and merged, in their judgment, furnishes sufficient evidence that it was too high; that their judgment was an arbitrary one not founded upon any principle or any valuation of the property, but given as a compromise, and must therefore be set aside; and that a reference should be ordered to ascertain the actual value of the property and enable the court to correct the assessment accordingly.

The act of 1846, § 49 (Nix. Dig. 800), requires the commissioners to "give such judgment as shall be agreeable to the principles of justice," and declares that their judgment shall be final and conclusive; but the act of 1852, § 2 (Nix. Dig. 804), gives the court power to amend the assessment, if it shall satisfactorily appear "that the amount or value of taxable property for which any person is therein assessed is too great." There is no evidence to warrant the conclusion that the assessment as reduced by the commissioners is too great, nor even that the property was valued by the assessor beyond its actual value; and in the absence of such evidence there is no power in the court to interfere with their judgment even if it was such a judgment as was contended by the counsel of the prosecutors. In the absence of such evidence and in the face of the deduction by the commissioners of one third from the original assessment, how can it be said that the assessment is still too high or that the judgment of the commissioners was not agreeable to the principles of justice? To establish the doctrine contended for by the prosecutors would open a door to endless litigation.

It does not appear that the prosecutors availed themselves of the right given them by the 11th section of the act of 1854 (Nix. Dig. 803), to fix the valuation by affidavit. The president of the company appeared before the commissioners and objected to the assessment; but it does not appear that he or any one else tendered to the commissioners the affidavit contemplated by the act. If the valuation was too high, he could have sworn before them to what he believed was the true value; and if the commissioners had refused to make a corresponding reduction, relief could have been obtained by *certiorari*. This section affords to all parties complete relief against any arbitrary or unjust proceeding on the part of the commissioners, and it is somewhat surprising that the pros-

ecutors did not avail themselves of it. What inference can be drawn from this omission except that they could not conscientiously take the necessary oath?

The objections which have been considered are not sufficient to warrant the interference of the court with the assessment or the judgment of the commissioners.

The remaining objection is that more tax was assessed than was authorized, and this is sustained by the evidence. The amount authorized for all purposes was $4,787.83, and the amount assessed was $5,071.72, an excess of $ 83.89. It must therefore be referred to a commissioner to ascertain what is the prosecutor's proportion of this excess, and to that extent the assessment must be set aside, but affirmed as to all the rest; the calculation of their proportion must be made upon the basis of their tax, as reduced by the commissioners of appeal.

LOGAN v. WASHINGTON COUNTY.

(29 Pennsylvania State, 373. Supreme Court, 1857.)

[1] **Taxation after severance of surface and mineral rights.** Where the owner of coal land has sold the right to take all the coal that is in his land, and retained the land itself, the owner of the land and the owner of the coal are each taxable according to their several interests.

Idem—Separation not to increase valuation. But this principle does not justify a higher valuation on the two interests, taken separately, than there would have been if both had continued in the same person.

Error to the Common Pleas of Washington County.

This was an amicable action in which the County of Washington was plaintiff and Logan & Dorman defendants, in which the parties agreed upon the following case stated:

And now, May 21, 1857, it is hereby agreed by and between the parties to the above suit, that the following case be stated for the opinion of the court, in the nature of a special verdict.

That the defendants own ten acres of land in Union township, contiguous to the Monongahela river, and also own the

[1] *Low* v. *Lincoln County Court*, 27 W. Va. 785.

coal under seventy-five acres of Levi Bentley's land, which has been and is assessed to him, in the rear of the said land of the defendants, and adjacent thereto; that they have coal banks opened upon their land, and have been working the coal vein back from the river front for a number of years; that the said ten acres of land and their personal property was properly assessed for the year 1856, and the taxes so assessed have been paid; that in the said assessment for 1856 a separate return was made by the assessor of the coal so owned by the defendants under the land of Levi Bentley, the valuation of the said coal privilege being fixed at the rate of thirty-five dollars per acre, and the tax levied by the plaintiff upon the said assessment, to-wit, fourteen dollars and fifty-six cents, has not been paid; and that coal under the lands of others was formerly assessed in this county, but for some years prior to 1856 such assessments have not been made, nor were they then made in any township except Union.

If the court be of opinion that the said coal, belonging to the defendants, under the lands of Bentley, is taxable, then judgment to be entered for the plaintiff for fourteen dollars and fifty-six cents; but if not, then judgment to be entered for the defendants. The costs to follow the judgment, and either party reserving the right to sue out a writ of error thereon.

The court below entered judgment on the case stated for the plaintiff for $14.56.

This was assigned for error in this court.

ACHESON and WILSON, for plaintiff in error.

MURDOCH, for defendant in error.

The opinion of the court was delivered by LOWRIE, J.

The taxing officers of Washington county have decided that, where the owner of coal land has sold out the right to take all the coal that is in his land, and retained the land itself, the owner of the land and the owner of the coal are each taxable, according to their several interests, and we are not able to say that this is wrong.

The question seems to us a very simple one. The assessors are required to value for taxation all real estate according to

its selling value, and this, of course, is measured by all the circumstances and advantages that tend to enhance its price, of which coal is a most important item. The coal is, therefore, necessarily included in the valuation, if it is accessible, and some person must pay the tax on it. The only question is, shall it be paid by the owner of the coal or by one who does not own it? To this there can be but one answer. There is a dividend ownership of the land, and there ought to be a dividend taxation.

The case is not at all singular in its principle. Where one man owns land, and another a rent issuing out of it, both are separably taxable, according to their interests. So it is where the privilege of wharf, or ferry, or fishery belongs to one, and the land to another. These cases are expressly mentioned in the tax law, and they do not exclude other cases involving the same principle, but rather include them. 3 Penn. & W. 107; 1 Pa. St. 331.

But the principle would not justify a higher valuation on the two interests taken separately, than there would have been if both had continued in the same person. The value of the land with the coal in it is not increased by the separation of the interests; but this separation requires an apportionment of the valuation among the different owners, so that each may bear his portion of the public taxes, and that one shall not have to pay for the other. The common pleas decided the cause rightly.

Judgment affirmed.

WOODWARD and ARMSTRONG, JJ., dissented.

STATE OF CALIFORNIA v. MOORE.

(12 California, 56. Supreme Court, 1859.)

Mining claim is taxable. The interest of the occupant of a mining claim is property, and under the constitution, it is in the power of the legislature to tax such property.

[1] **Property in claims always recognized.** The whole course of legislation

[1] Distinguished, *People* v. *Morrison*, 22 Cal. 81; approved, *People* v. *Shearer*, 30 Id. 658.

and judicial decisions in this State, since its organization, has recognized a qualified ownership of the mines in private individuals.

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation; and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which private individuals have acquired in the same. Exemption from taxation is a privilege of the government, not an incident to the property.

Conjectural value of mining claim. There is no force in the objection that the value of a mining claim, which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture.

Value, standard of. The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands.

Exemption not to be evaded. The legislature having expressly exempted mining claims from the operation of the Revenue Act, it can not be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them.

Money invested in the purchase and opening of mining claims, is not within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce, or business whatsoever."

Appeal from the Fourteenth District, County of Nevada.

This is an appeal by defendant from a *pro forma* judgment rendered for the plaintiffs in an action instituted to try the legality of the tax levied on the money expended in the purchase of mining claims.

The pleadings and agreed statement show the following facts, viz.: That the defendant's claims are situated upon, and form a part of the public domain of the United States; that the sum of $20,000 was paid by him some three years since for such claims; and that the further sum of $500 has been expended in constructing a tunnel for the working of the same.

On the nineteenth day of July, 1858, the county assessor proceeded to assess the sums above mentioned, as the property of defendant; and on the twenty-first day of July, 1858, this suit was instituted to recover the amount of the tax alleged to be due thereon.

McCONNELL & NILES, for appellant.

THE ATTORNEY GENERAL, for respondent.

TERRY, C. J., delivered the opinion of the court, BALDWIN, J., and FIELD, J., concurring.

Defendant is the owner of a certain mining claim, for which he paid the sum of twenty thousand dollars, and upon which, since the purchase, he has expended the sum of five hundred dollars in opening a tunnel.

These sums were assessed against him as money invested in the business of mining. The object of this action is to test the legality of this assessment, and the questions presented are: 1st. Whether, under the constitution, it is in the power of the legislature to tax mining claims; and, 2d. Whether money invested in the purchase and opening of such claims, is within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested, or employed in any trade, commerce, or business whatsoever."

Upon the first of these propositions we entertain no doubt. The only objection to the power of the legislature to impose such a tax arises from the fact that the mines are the property of the government, and are exempt from taxation under the act admitting California into the Union. This fact, however, if admitted, does not, in our view, militate against the right to levy a tax upon the interest of the possessor of such claim. The whole course of legislation and judicial decisions in this State since its organization, has recognized a qualified ownership of the mines in private individuals. Contracts affecting mining claims have been constantly enforced; remedies have been afforded to those whose possession has been disturbed, or whose claims have been trespassed upon by others, and the right of the locator to sell, hypothecate, or in any manner dispose of his property in a mining claim, has been upheld, as well by legislative enactment as by judicial decisions.

In *Tartar* v. *Spring Creek Co.*, 5 Cal. 395, the court held that "the policy of this State, as derived from her legislature, is to permit settlers, in all capacities, to occupy the public lands, and, by such occupation, to acquire the right of undisturbed enjoyment against all the world but the true owner."

In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy;

to license miners; to provide for the recovery of mining claims, etc., "and that an appropriation of a portion of the public domain, or any of its incidents," establishes a *quasi* private proprietorship which entitles the holder to be protected in its quiet enjoyment.

In *Merced M. Co.* v. *Fremont*, 7 Cal. 317, we held that the possessor of a mining claim "by his appropriation acquires a vested interest in the exclusive occupation and enjoyment of the land as against all the world, subject only to the right of the government by whose license and permission his possession was acquired; and his right to protect the property for the time being, is as full and perfect as if he were the tenant of the superior proprietor for year or for life;" and in *McKeon* v. *Bisbee*, 9 Cal. 137, we held that the interest of the possessor of a mining claim was property under the law, and subject to be seized and sold under execution.

The legislature recognized a proprietary interest in the possessor of mining claims by authorizing their hypothecation. See Wood's Dig. 108, Art. 416.

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation, affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege of the government, not an incident to the property.

In the hands of the government, the lands are exempt, but the moment the title vests in a private individual, it becomes liable to the burthens which are imposed on other property of like character. If the acquisition of the fee by a private person subjects the property to taxation, it follows that the acquisition of a lesser estate would equally subject such estate.

There is no force in the objection that the value of a mining claim, which depends upon the amount of precious metals it contains, must necessarily be left to conjecture.

The universal standard of value is the amount of money which can be realized by a sale of the property, and this will

apply as well to mining claims as other lands. Sales and hypothecations of mining claims are of everyday occurrence, and we apprehend their value can be ascertained with sufficient accuracy.

Upon the second proposition, it is contended that though mining claims are by the statute expressly exempted from taxation, yet the money expended in their purchase and working is liable, as so much capital invested in the business of mining.

This rule would be manifestly unequal, and would in a large class of cases be productive of palpable injustice, hardship and oppression; it would exempt the first locator of a claim from taxation, while his vendee would be compelled to pay a percentage upon the purchase price, although the value of the claim at the date of the assessment might not be a tithe of the sum. The claim may yield no return whatever; may prove entirely valueless for any purpose; yet the price paid would, under the rule contended for, be a *permanent* "investment of capital," and the party compelled to pay yearly a percentage on the amount.

Or take the case of a party who, after locating a claim, sells a moiety to another for a large sum; the interest of each is equally valuable and equally protected by the government, yet one is required to contribute to the support of the government in return for the benefits afforded, while the other, who is in the enjoyment of the same benefits, contributes nothing. We think a consequence so manifestly absurd, unjust, and oppressive, was never intended by the legislature.

We do not understand a sum paid for the purchase of specific property to be so much capital invested. The mere purchase of property can in no just sense be said to be an investment of capital in the business for which the property is adapted or might be used. The purchaser parts with all interest in the money paid; he has no longer any claim upon it; and if the transaction constitute an investment of capital, the value of the property, and not the sum paid for it, is the amount of the "capital invested." As well might the purchaser of a farm be required to pay taxes on the price paid as so much "capital invested in the business" of farming, as the purchaser of a mining claim upon the cost of such claim.

For the purposes of taxation, there is no distinction betweer

a thing and its value; it is the value which is assessed, and upon which the tax is imposed, and an exemption of certain property from taxation exempts its value also.

Our conclusions are: 1st. That the interest of the occupant of a mining claim is property liable to be subjected, at the will of the legislature, to such burthens as are imposed on other property. 2d. That the legislature having expressly exempted mining claims from the operation of the Revenue Act, we can not presume that it intended indirectly to subject them, by levying a tax on the price paid for them, which would, as we have shown, be a partial and unequal mode of ascertaining the value, and, in a majority of cases, be productive of great injustice.

It follows that the judgment of the court below is erroneous, and it is reversed with costs.

HALE & NORCROSS GOLD AND SILVER MINING COMPANY, Appellant, v. STOREY COUNTY ET AL., Respondents.

(1 Nevada, 104. Supreme Court, 1865.)

The common law adapts itself to the circumstances and necessities of the community where it is introduced.

[1] **Possessory rights to mining claims are property,** and as such, taxable.

Taxation of the possessory right is not in violation of the organic act which prohibits the territorial legislature from taxing the property of the United States. The object of the section was to protect the government, and not to prevent the taxation of settlers on public lands.

[2] **"Mining ground"—Technical meaning of the words.** The words "mining ground" when used in a deed, have a technical meaning. They refer to that interest which a mere occupant of the mine has in the same. They are not the words used when a fee simple or leasehold interest in real estate is to be conveyed.

Appeal from the District Court of the First Judicial District of the State of Nevada, Storey County, Hon. CALEB BURBANK, presiding.

[1] *Forbes* v. *Gracey*, 14 M. R. —.

[2] *State* v. *Real del Monte Co.*, 4 M. R. 334.

The facts are stated in the opinion of the court.

BALDWIN & HILLYER, for appellants.

DIGHTON CORSON, for respondent.

By the Court, BEATTY, J.

This was a complaint in equity filed by the plaintiff for the purpose of restraining the officers of Storey county from the collection of certain taxes which are alleged to be illegally assessed.

The defendants demur on the ground that the complaint does not state facts sufficient to constitute a cause of action.

But there is a stipulation in the transcript that the sole question to be raised or determined in the case is the "legality of the tax imposed under the revenue laws of the Territory of Nevada."

With this stipulation on the record, we will not inquire into the propriety or legality of the remedy sought in this case, but will confine ourselves to the question of the legality of this tax, and the manner of its levy.

With regard to the legality of the tax, two main questions are presented. The first and most important one is, can the possessory rights of miners to mining ground belonging to the United States be taxed?

The objections to the taxation of the mines are, that the title of the real estate is in the government; that the legislative assembly was by express enactment (see Sec. 6 of Organic Act) prohibited from imposing taxes on property of the United States; and that the interest of the miner is not such property as is, in its nature, taxable; that it is too intangible and unsubstantial to be the subject of taxation. It has been said that the miner is a naked trespasser, without claim of title, a licensee or else a strict tenant at will, not entitled to notice to quit, and therefore having no valuable estate. That having no estate which is under his own control, but being, as it were, a mere occupant by sufferance of the government property, he has no property therein, and therefore his interest can not be taxed as such.

By the strict rules of the common law, as it formerly existed, an action of ejectment could not be maintained upon the demise of a mere tenant at will, a licensee or a trespasser on the king's government land. But the common law is a law of reason and common sense. It adapts itself to the circumstances and necessities of the community where it is introduced. Here the policy of our government has been peculiar; owning vast bodies of mineral lands, it has encouraged the working of those mines by its citizens, but has steadily refused to make a grant of any kind of estate to the miner. Individuals have made large investments in mines and improvements, whilst the entire estate in the lands remains in the government. The government could not, like an ordinary proprietor, protect its licensees by the institution of suits against trespassers. From the necessity of the case, these licensees (we think they come nearer licensees than tenants) must have legal protection.

The courts and the laws adapting themselves to the necessity of the case, and governed by rules of common sense, reason and necessity, have universally treated the possessory rights of the miner as an estate in fee. Actions for possession, similar to the action of ejectment, actions of trespass, bills for partition, etc., are constantly maintained.

Such interests are held to descend to the heir, to be subject to sale and execution, and to be assets in the hands of executors and administrators for the payment of debts. This general proposition will hardly be disputed, that a territorial legislature may tax any species of property, whether real, personal, or mixed, corporeal or incorporeal, so far as they are not restrained by the Organic Act. It appears strange to us that that which is so far property as to be subject of litigation in an action wherein the judgment, if for plaintiff, is for restitution of possession, is so intangible when you come to enforce collection of revenue, that it can not be reached by process of law.

We are referred to the language of the learned justice who wrote the opinion in the case of *People* v. *Morrison*, 22 Cal. 78, as an authority for the proposition that Congress intended to exempt possessory claims from taxation in order to encourage the settlement of the public lands, to bring them into market, to expedite the sale thereof, and thereby afford rev-

enue to the government. Such a law (we mean one exempting all settlement rights from taxation) might encourage the *settlement* of public lands, but we are not so sure that it would facilitate their sale. If, prior to sale and payment for them, the settler is free from taxation, and liable to taxation thereafter, he would, unless very patriotic, endeavor to delay the sale of the land he was occupying and avoid the payment as long as possible to save taxes. The government did at one time attempt to protect the settlers on public land from taxation, by providing that no State should levy taxes on land sold by the government for a period of five years after sale. But that policy was abandoned many years since.

We think of late years the government has only attempted to protect itself, and left the States and territorial governments to regulate the subject of taxes among their own citizens according to their own views of justice and propriety.

The next point to be considered is, does the description given by the assessor conform to the requirements of the statute, and more especially does the description distinguish between the possessory right, which is liable to taxation, and the ultimate right to the land, which is in the government?

The assessment is in this form:

"Hale and Norcross Mining Company: 400 feet of mining ground, situated," etc.

Here follows description, by metes and bounds. Then comes:

Value of real estate	$150,000
Value of improvements	25,000
Value of personal property	2,400
Total	$177,400

Here is a description of the property which we believe is not claimed to be seriously defective, except that it does not point out whether the real title to the land, or the possessory title *only*, has been assessed.

The statute defines what real estate means, and where the value of one hundred and fifty thousand dollars is attached to the property, we have only to look into the statutes of 1864, p. 38, Sec. 3, to see that real estate means only "the ownership or claim to, or possession of, or right of possession to any lands or mines in the territory." As the property is described

as mining ground, then the real estate taxed at one hundred and fifty thousand dollars, was "ownership or claim to, possession of, or right of possession" to the mine described.

The next line as clearly points out the improvements which are situated on this same piece of mining ground, and shows the assessor intended to assess these improvements to the plaintiffs, who owned or claimed the mine.

But does this assessment show that the possessory title only is assessed? It appears to us it does. In the first place, we think the court must take judicial notice of the facts which are known to all intelligent persons, and are a part of the history of the territory—that the government originally owned all the land in the territory, and has never parted with the title to any which is known to be mineral land. Therefore, the legal presumption arises that a mine in the territory (now State) of Nevada, belongs to the government, and the occupants have only a possessory title. Therefore, an assessment to an individual or company of so many feet of mining ground, clearly conveys the idea of a possessory right. The language does not convey to any one having a knowledge of the history of the country the idea of an ultimate right to the land on which, or in which, the mine is located.

Indeed, the most apt and fit words seem to have been used by the assessor to convey clearly his meaning. In all ordinary conveyancing, the word "land" is used to designate a certain portion of the earth's body which is the subject of sale. And if one here were the owner of a body of land containing a mine or ledge of silver-bearing ore, in selling it, any conveyancer of common intelligence would use the word *land* when describing the thing granted. But here all conveyancers use the word *ground* when making deeds for possessory claims. "Possessory claim" to the land or ground is hardly ever introduced into mining deeds. So many "feet of mining ground," is the term almost always used.

This phrase is familiar to everybody; we know, the moment we read the phrase, that it means the right of the occupant on the public lands. When the assessor avoided the term "*land*," and used the term "*ground*," which has become a technical word in Nevada deeds, he used the very word he should have used in describing the interest to be taxed. We

are told, however, this view of the case is in conflict with the decision in 22 Cal., to which we have before referred. There the term "*land*" is used, and in that State a large amount of land is owned by private individuals interspersed among the public lands in every part of the State. The term there used would indicate that the value of the land, free of incumbrance, was assessed. Clearly, the settler was not bound for such an amount. The utmost value of his interest was the worth of the land, *less* what he would have to pay the government for the title thereto.

The judgment of the court below is affirmed.

CITY OF VIRGINIA, Appellant, v. THE CHOLLAR-POTOSI GOLD AND SILVER MINING CO., Respondent.

(2 Nevada, 86. Supreme Court, 1866.)

Virginia city charter—Constitutional construction. Sections one and eight of article eight of the constitution of Nevada, so construed as to give validity to the new charter granted to Virginia city in March, 1865.

Ore tax in Nevada. Ore is personal property, and as such, liable to taxation for municipal purposes. An assessment of the proceeds of mines which deducts from the gross yield $20 per ton, and 25 per cent. from the remainder, and subjects the balance to the same *ad valorem* tax as other property, is an equal and uniform taxation of that class of property under the constitution. Where, on refusal of the owner to list all his ore, it is rated at $500 per ton, it may seem a harsh rule, but it is for the refusal to list, and is no more than a just penalty. The fact that ore had been removed from the city before the passage of the ordinance, but during the annual period or fiscal year for which the tax was levied, is no cause for deduction of such ore from the total of annual proceeds.

Tax on out-put—Mines exempt. The constitution of Nevada exempts mines and mining claims from taxation, and says that the proceeds alone shall be taxed.

Appeal from the District Court of the First Judicial District; Hon. R. S. MESICK, presiding.

The facts are stated in the opinion.

CLARK CHURCHILL and MCRAE & RHODES, for appellants.

HILLYER & WHITMAN, for respondents.

By the Court, BEATTY, J.

This was a suit brought for the collection of municipal taxes alleged to be due from the defendant to the city of Virginia for taxes on the products of a mine.

Virginia was a city existing under territorial law when the constitution was adopted. In March, 1865, the State legislature passed a law re-chartering the city, and repealing the former law granting a charter, so far as it was inconsistent with the new act of incorporation. Sec. 17 of the act of March, 1865, empowers the board of aldermen "to levy and collect taxes on all property within the city, both real and personal, made taxable by law, for State or county purposes." Sec. 20 of the same act authorizes the board to provide by ordinance the manner of assessing and collecting taxes.

The first election under the new charter took place the first Monday in May. The new officers qualified the second Monday of May. The board of aldermen in the month of September following, passed an ordinance prescribing the mode of assessing and collecting taxes.

That ordinance provided for a quarterly assessment and payment of the tax on the proceeds of the mines; the first quarter to commence the last Monday of May, and end the last Monday of August, 1865. The ordinance in prescribing the manner of assessing the taxes on the proceeds of mines follows the same course prescribed by the State legislature for assessing them for State purposes. That is in substance, to ascertain the amount and yield of ores from each mine for one quarter, to deduct from the gross yield first twenty dollars per ton; then to deduct from the remainder one fourth, or twenty-five per cent., and to assess the remaining three fourths at the same *ad valorem* tax as other property. The complaint sets out all the foregoing facts, and many other facts to which it is not now necessary to allude, as the contested points in the case will be explained by the foregoing statement and such additional facts as we will be obliged to allude to in the course of this opinion.

The court below sustained a demurrer to the complaint,

and entered judgment for defendants, and the plaintiff appeals to this court from the judgment rendered by the court below.

We will follow the counsel of respondent in noticing the different grounds on which they claim the judgment must be sustained.

First, it is claimed that the city of Virginia is not a corporation, and its aldermen have no municipal powers, for the reason that the law of March, 1865, granting the new charter, is void, because it is in conflict with constitutional provisions. Sec. 8, article 8, of the constitution is in these words: "The legislature shall provide for the organization of cities and towns by general laws; and restrict the powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water."

Here is a requirement of the legislature to do a certain thing; to pass a general law on a certain subject. This provision of the constitution remains inoperative until the legislature performs its duty; at least it remains inoperative so far as any positive effect is to be given to it. But it may be contended that it has a negative effect—that it raises an implied prohibition against the legislature passing any *special law* for organizing cities or towns. Although there are no negative terms in the clause, if it stood alone and was not qualified by any other clause, we would certainly be inclined to hold that such was the intention and effect of the section. Otherwise it would be useless, for if the legislature first passes a general law, and then goes on to pass a special law, organizing each new town or city as it comes into existence, the general law would be a dead letter in the statute book. Doubtless the framers of the constitution intended that section of the organic law to have some beneficial effect. But there is another section of the constitution, to wit: section 1 of article 8, which we think settles this question. That section reads as follows: "The legislature shall pass no special act in any manner relating to corporate powers, except for municipal purposes; but corporations must be formed under general laws; and all such laws may, from time to time, be altered or repealed."

The expression "in any manner relating to corporate powers," is a rather ambiguous phrase, but we think the framers

of the constitution meant by that language to prohibit the *formation of corporations by special acts.* The subsequent language, "but incorporations may be formed under general laws," shows that was the meaning intended to be conveyed. Then, to use more appropriate language, the section would read in this way: "The legislature shall pass general laws for the formation of corporations; but no corporation (except corporations for municipal purposes) shall be created by special act."

This, we think, is what the constitution meant to express. Is there not here positive implication that the legislature may create municipal corporations, much stronger than the negative implication in section eight that they shall not? Besides, the power to create municipal corporations is one usually exercised by State legislatures, and we ought not to infer that the legislature of this State was inhibited from the exercise of such power, unless the constitution is reasonably clear on the point.

But there is another view to take of this power. It may be that the convention intended by section eight to provide that all new towns and cities should be *organized* under a general law. After they were once organized, if their size, circumstances and necessities required more extensive or more restricted limitations upon the municipal officers than those conferred by the general law, the legislature might apply the remedy by special act. If such was the intention, we think the new charter was framed strictly in accordance with the idea. Virginia was a chartered city when the constitution was adopted; it was already organized as a municipal government. It has never ceased to be such. The new charter is, in effect, but an amendment of the old one. If the legislature could pass any special law in respect to municipal corporations (and of that we have no doubt), we think there is no constitutional objection to this one.

The act creating the new charter expressly authorizes the board of aldermen to provide for the levy, assessment and collection of a tax on all property, real and personal, in the city, which is subject to taxation for State and county purposes.

Admitting the city of Virginia to be a legally constituted

corporation, it is contended the corporate authorities had no power to levy this particular tax on the proceeds of the mines.

The corporation is authorized to tax "all the property, real and personal, in the city, which is subject to taxation for State and county purposes."

But, say respondents, these ores attempted to be taxed are not *real estate* in the nature of things; and not *personal estate*, because the statute declares they are not.

The fifth section of the Revenue Act defines real and personal estate, and winds up with this proviso: "That gold and silver-bearing ores, quartz, or minerals from which gold or silver is extracted, when in the hands of the producers thereof, shall not mean, nor be taken to mean, nor be listed and assessed under the term 'personal property,' as used in this section of this act, but is specially excepted therefrom, and shall be listed, assessed and taxed as hereinafter provided."

As we understand this proviso, it does not intend that ores which are the product of mines shall in no case be held or treated as personalty, but simply that such ores are not to be considered as included within the definition of personal property, as used in that section, and that they are not to be listed or taxed under the general provisions in regard to personal property, but under other and special provisions as to the product of mines. We think the products of mines are personal property subject to taxation for State and county purposes, and also to municipal taxation, under the law conferring the taxing power on the corporate authorities of Virginia. It is further objected that this assessment was on property not in the city when the ordinance was passed for the assessment. The assessment was on property which was in the city after the passage of the law by the legislature.

All property within a city or State, except that which is *in transitu*, is liable to one annual taxation. The act of the legislature was sufficient authority for taxing all property within the city after the passage of that act. It made no difference when the ordinance was passed or the assessment made; if it were owned and held in the city at any time during the year after the law was passed, it was subject to taxation. The duty to pay a tax on the property arose whilst the property was in the city. It could make no difference that it was

removed from the city before the ordinance was passed prescribing the amount of tax to be paid, and the manner of assessing and collecting. There is no objection to making an act so far retroactive as to enforce the performance of an existing duty. We do not think the position that the ordinance is void, because it attempts to assess by legislation, is tenable.

The tenth article of the constitution provides: "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, or possessory, except mines and mining claims, the proceeds of which alone shall be taxed."

The leading feature of this section is that the taxation shall be equal and uniform, and that the proceeds of the mines only shall be taxed. In other words, whilst the body of the mine remains untaxed, the ore taken out (for that is the primary proceeds of the mine) shall be subject to the same *ad valorem* taxation as other property. The mode of assessment prescribed by the legislature, and followed by the city ordinance, was doubtless intended to arrive at the true value of the ore, and tax it at that value. It is evident when the ore is taken out of the mine it is not worth what it will yield; for if ore be taken out which, by working process, will only yield twenty dollars per ton, and it costs twenty dollars to haul it to a mill and have it worked, it is really worth nothing; hence it was very properly provided that in assessing ores, twenty dollars per ton should be taken from the actual yield of such ores, that being generally considered about the cost in the principal mining districts, of hauling ores to the mill and working them, at the time the law was passed. In addition to the deduction of twenty dollars per ton, there is a deduction of twenty-five per cent. from the remainder. Why this latter deduction was made, it would be hard to say, but this is not injurious to those who pay taxes on the proceeds of mines, and they have no right to complain. There ought to be some settled mode of ascertaining the value of ores or the proceeds of mines. The legislature is the body to prescribe that method. If there is nothing in the manner prescribed grossly unjust and in violation of that principle of equality prescribed in the constitution, this court would not interfere with their action.

Absolute equality in assessments is known to be impossible. We do not see anything in the mode prescribed by the legislature, and followed by the ordinance, which so far violates the principles prescribed in the constitution as to authorize us to say the spirit of that instrument has been disregarded. The fixing of a valuation of five hundred dollars per ton on all ores, when the owners or managers of mines refuse to furnish the means of making a more correct assessment, is apparently a rather harsh rule, but there is no difficulty in avoiding such assessments. If a party willfully refuse information, it is but a just penalty for neglecting to perform a plain duty; in such case they can only blame themselves.

As the board are authorized to prescribe by ordinance the method of enforcing payment of these taxes, we see no reason why they may not add a penalty for not paying the taxes when demanded, which shall compensate the city or its attorney for the trouble and delay of enforcing the collection. The judgment is reversed. The court below will reinstate this cause on the calendar, overrule the demurrer, allow the defendant to answer if it chooses to do so, and proceed with the trial of the cause.

COMMONWEALTH v. THE OCEAN OIL CO.

(59 Pennsylvania State, 61. Supreme Court, 1868.)

[1] **Tax on corporate net income**—[2] **Income defined.** An oil company was incorporated with a capital of $1,000,000, which was invested in oil land. Their dividends were only from the produce of oil wells, and were credited to the capital stock invested. The company claimed that they were not liable to tax on net income, until the proceeds from oil had repaid all the capital: *Held*, that the income from their works, after deducting expenses, was the net income to be taxed.

Capital stock presumed to continue. Capital stock paid into a corporation authorized to transact business, and divided into shares, is presumed to remain until its dissolution.

Income—Dividends. The net income of a corporation is liable to taxation, whether declared in dividends or not.

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[1] Affirmed. *Com.* v. *Penn Co.*, 14 M. R. 163.

[2] *Binney* v. *Ince Hall Co.*, 11 M. R. 410.

Error to the Court of Common Pleas of Dauphin County.

This case originated in the court below from an appeal by the defendant, The Ocean Oil Company, from the settlement of the Auditor General and State Treasurer, made April 4, 1867.

The company made a return of $311,954.14 as their net earnings or income for the year ending November 1, 1866, on which they were taxed at the rate of three per cent., making $9,358.74. They appealed from this settlement, alleging that no net earnings had been realized during that year, and that the return had been made by mistake.

On the trial before PEARSON, P. J., the Commonwealth having given in evidence the company's return, the defendants called David Boyd, who testified:

"On November 13, 1866, I was elected treasurer, and got the late treasurer to make the report. He did so and I signed it, but discovered soon after that it was entirely incorrect. I wished to get it back, but could not, and then appealed. I examined and found we had made no profits. We have since made two years' reports, and they were accepted. The amount paid in this case was $1,000,000. We declare dividends of oil, which are only a return of the investment to those who advanced. We have returned to shareholders some $600,000 or more, but our books will not balance till $1,000,000 is paid in No net earnings are made. We pay a tax on our capital stock, $15,000 last year, $10,000 this year. The first well flowed some three hundred barrels per day; next one pumped seventy-five barrels per day. Flowing wells do not last over four or five months; pumping wells six months generally.

"Paid $1,000,000 in stock for the land, and the holders realized over a million. The company actually paid a million. Some stock sold at $4, some $20 per share; original shares sold low—land had not been developed then."

Judge PEARSON charged the jury:

"If the oil were, practically speaking, inexhaustible, the product, after deducting expenses, would be net profits; but if you are satisfied that all the oil will soon be extracted from this land, then the company divides not its net profits alone, but its capital. * * *

"In assessing the actual profits in business of the character

under consideration, we must look to probabilities as demonstrated by experience. If you are satisfied from the evidence that this company is consuming and dividing its capital, which may soon be gone entirely, then all of the dividends declared are not net profits. If the oil will last for a few years to come, the capital will be refunded to the stockholders, after which all that is made above expenses will be net income; but should the Commonwealth be obliged to wait for its taxes until that occurs? We think not, but that a jury should act on reasonable probabilities, as every man would do in assessing the value of this property as oil territory, taking into account the time that it will probably take to exhaust the capital, and the profits which will be made in the meantime; you can then consider whether the whole sum returned was net earnings or income, or whether the company should be charged with one half, one third, one fourth, or with whatever quantity thereof, and render your verdict for such sum, with interest thereon, after three months from the date of settlement."

The verdict was for the Commonwealth for $3,205.35.

The Commonwealth took a writ of error, and in several specifications assigned the charge of the court for error.

BREWSTER, Attorney General, for Commonwealth, plaintiff in error.

J. C. KUNKLE, for defendants in error.

The opinion of the court was delivered by READ, J.

The capital of oil companies is generally nominal, and when, therefore, the capital of this company is called one million dollars, it is very evident that this sum was not paid for the four acres of land, but that it was valued for the purposes of a division into stock at one million dollars. "Some stock sold at $4, some $20 per share," says the treasurer; "original shares sold low—land had not been developed then."

This company calling and returning its capital at one million, is taxed upon its capital stock at that sum, but by the act of the 30th April, 1864, Pamph. L. 218, the "net earnings or income" of said corporation are subject to a State tax of "three

per centum upon such annual net earnings or income, in addition to the taxes now imposed by existing laws."

The question therefore, is, what is the meaning of "net earnings or income?" Does it mean as it was construed by the treasurer in his report to the auditor general, the product of the business after deducting expenses only? If so, then the settlement by the auditor general and state treasurer is correct.

But it is contended by the company that the annual product must first be applied to the repayment of capital, and this would leave no net earnings or income to tax. The court below compromised between these two constructions, and held that there must be an application of so much of the annual product as would repay the capital, in the probable number of years that oil would flow or be taken from the land, and then the surplus would be the net earnings or income subject to taxation. This mode requires the interposition of a jury wherever there is a difference of opinion between the company and the State authorities.

I can see no warrant for such a reading of the law. The income from the works of the company after deducting all expenses, appears in this case by the testimony of the treasurer to have been paid to the shareholders as dividends, and were no doubt advertised as such, thus enhancing largely the value of the stock in the market.

When a capital stock is created and paid into a corporation authorized to transact any business, whether of banking, manufacturing or mining, and is divided into shares of a fixed amount, that capital is presumed to remain until its dissolution. The value of the stock and the shares into which it is divided may rise or fall according to the success of the enterprise. In banks, for instance, the profits may be largely remunerative, or if unfortunate, the capital may be utterly lost. This is the theory of incorporated companies; the capital invested remains either really or nominally to their close.

The present company pays dividends, which are, of course, its net earnings or income, and it is the net income, whether declared or not, the State intended to tax. This is the plain, common sense meaning of the term, made familiar to every one since the formation of the internal revenue system. The

theory of the company is, that the capital must be repaid to its shareholders, and then it has no capital left.

But if this company has paid $600,000, it must be different from all other such companies, if its shareholders have not been overpaid already. The court below were therefore in error in allowing a portion of the net earnings to be applied to the reduction of the capital stock.

Judgment reversed and venire de novo *awarded.*

THE STATE OF NEVADA v. KRUTTSCHNITT ET AL.

(4 Nevada, 178. Supreme Court, 1868.)

Review of the Nevada system of taxing ores with the *dictum* that the tax on ores is more favorable to the mining interest than would be direct taxation of the mines.

The collection of ore tax quarterly does not amount to more than a regular *pro rata* tax on the whole annual proceeds, and does not operate to make the mines pay more than that, even when the item of interest is considered.

The difference in value between gold and currency is not affected by the fact that both are legal tender; and the recognition of this fact in the revenue system is essential to produce uniformity of assessment.

Sworn statements not conclusive. The assessor is not bound by the sworn statements required by law to be furnished him by the taxpayer.

The formula of assessment stated in detail in the opinion of Beatty, C. J.

Ignorance of official duty no excuse. A person who undertakes any employment, and particularly that of a public office, must understand his duty, and he can not be excused for want of knowledge.

Misjoinder of causes of action. A cause of action on an official bond against the principal and his sureties can not be united with a cause of action for damages against the principal alone.

Judgment for official delinquency. A judgment for damages against an officer for official delinquency, which remains unsatisfied, will not prevent a subsequent action on the official bond.

Sworn statement must show amount and value of product. The revenue laws require the sworn statement of the product of a mine to show the amount of such product in weight, and not merely the amount in dollars; they require both the amount and value to be given. LEWIS and JOHNSON, JJ.

Appeal from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

R. M. CLARKE, Attorney General, and MESICK & SEELEY, for appellants.

The Revenue Act of April 2, 1867 is constitutional: *City of Virginia* v. *Chollar-Potosi M. Co.*, 2 Nev. 92; *State* v. *Eastabrook*, 3 Nev. 173. The various sections of the Revenue Law were discussed at length by counsel. Upon the various points referred to in the opinion, counsel cite: Sec. 101 Rev. L.; Stat. 1867, 160, Sec. 3; Secs. 107–23, Rev. L. of 1865; Rev. Acts, 1865, 306–8, Secs. 90–106; Acts of 1867, 159–60, Secs. 3-4.

HILLYER and WHITMAN, for respondents.

All the various sections of the Revenue Law cited in the brief of appellant were discussed at length by counsel for respondent. The assessor can not be held upon his bond for error in discretion, unless acting wilfully or corruptly, and some cases go so far as to say not then: *Wilson* v. *Mayor, etc.*, 1 Denio, 595; *Kendall* v. *Stokes*, 3 How. 87.

By the Court, BEATTY, C. J.

This was an action brought by the State of Nevada against the assessor of Storey county, and his sureties on his official bond, for malfeasance in office in having failed to assess the proceeds of mines in Storey county for the quarters ending on the thirtieth of June and the thirtieth of September respectively, in the year 1867.

The complaint contains two counts. The first is for failure to perform his duty in regard to the quarter ending June 30, 1867. On this count there was, perhaps, a failure on the part of the State to make the proofs correspond with the averments of the complaint. The proofs offered in support of this count were not such as to present any of the more important points that were involved in the trial of the second count. For this reason the whole argument of counsel was directed to the rulings of the court in regard to the second count. For

the same reason we may, for the present at least, pass to the consideration of that count.

In regard to the second count, this state of facts appears: The assessor called on the mining superintendents for a statement of the yield, etc., of their several mines for the preceding quarter. They furnished him statements showing the whole number of tons worked during the preceding quarter, the number worked by wet crushing, and the number worked by Freiburg, roasting or smelting process. The statements also showed the aggregate gross yield of all the ores, and the estimated net value per ton of the ores worked respectively by wet and dry process. The assessor then entered on his books the net or taxable value of the different classes of ores from this statement, without making any estimate of the difference in value of gold and of paper legal tender currency, and in fact without making any estimate upon his own judgment of the value of the ores. The plaintiff alleges, as a breach of the assessor's official bond, his failure to assess the value of the ores taken from the different mines.

The defendants contend: First. That the sole duty of the assessor consists in procuring the proper statements from the mining superintendents of the result of the working of the several mines in his district for the preceding quarter, and entering those results in his book or list of assessments. That he can not go behind these returns, or question these results. That he has no power to make any estimate for himself of any mine, except where there has been a refusal to furnish the proper statement by the mining superintendent. Second. That even if he has the power to estimate for himself, he has not failed in his duty, or at least his failure has done the State no harm, for it is not denied that the statements copied by him in his assessment roll are correct in all other respects, except that they fail to distinguish in their valuation between gold and paper currency; and this distinction he could not make without violating the laws of the United States. Third. That the tax on mines as now assessed and levied is unconstitutional and void, and the assessors can not be held liable for having violated an act which is void and inoperative.

We have stated in the three foregoing propositions, we think, the substance of the points made by defendants' counsel,

(though not in their language) so far as it will be necessary to decide them in this case. There are some minor points discussed in the briefs, which it will not be necessary to notice, because the settlement of these three main points will dispose of the case.

We will discuss the points stated in the reverse order of their statement. We have already held that the section of the constitution which forbids the taxation of the mines, but requires the taxation of the proceeds of the mines, means that the entire proceeds of the mines shall be taxed—not the mere proceeds which happen to be on hand at the particular time the assessor may happen to visit the mine. We have also held that all *ad valorem* taxes, whether on the proceeds of mines or other property, must be equal: *State* v. *Eastabrook*, 3 Nev. 173, and *State* v. *The Cal. State Tel. Co.*, decided in the present term. To have held that the convention meant, when it provided for the taxation of the proceeds of mines in lieu of the body of the mine, that only such portion of the proceeds should be taxed as happened to be on hand once a year, when the assessor went to the mine to make his annual assessment, would have been equivalent to holding that mines and their proceeds were practically to be free from taxation. For, as the proceeds of mines are worked from day to day, and sent from the State about once a week, there would never, at any one time, be enough of the proceeds on hand to be worth taxing.

Since the decision of the case of *State* v. *Eastabrook*, there has been a decision of the Supreme Court of the State of California in the case of the *People* v. *McCreery*, fully sustaining our views in regard to the equality of the *ad valorem* taxation. The constitution of California and our own are, so far as this point is concerned, about identical in language, and the Supreme Court of that State, composed of five judges, came unanimously to the same conclusion as this court did on that point. Subsequently two new judges came on the bench and they, in response to a petition for a rehearing, fully concurred with the rest of the court, thus making seven California judges concurring, without a dissenting voice, in the views expressed by this court as to the necessity of equality in regard to the rates of taxation on all species of property subject to an *ad valorem* tax.

But we are told this interpretation of the constitution is so unjust and oppressive to the mining interest, that we should review our opinion, and, if possible, find some interpretation of that instrument less onerous and objectionable. We are even told if this harsh interpretation of the constitution is insisted on, it may result in the mining counties repealing all law for the collection of taxes from the proceeds of mines. A regret was expressed, on the argument of this cause, that the members of the legislature from the mining counties had not defeated the entire revenue bill of 1867, rather than allow such oppressive taxation.

There can be no doubt but that whenever the interpretation of a statute or a constitution in a certain way will result in manifest injustice, courts will always scrutinize the act or constitution closely to see if it will not admit of some other interpretation; for it is not to be supposed that any legislative body passes an act for the purpose of doing a manifest wrong. Let us see, then, whether there is anything so manifestly wrong in the operation of this constitutional provision as we have interpreted it. With regard to *ad valorem* taxes on property, we believe it is by universal consent admitted that it is not unjust to make every species of property bear precisely the same rate of taxation. From this general rule there are sometimes deviations. But where there is such a deviation, it is usually upon the ground that there is some policy to be subserved thereby, not that the general rule would be unjust. If there is any exception to the general rule, it must be in favor of property which is either totally or in a great measure unproductive. On such property it is sometimes contended that it is unjust to impose taxes, because it produces no income or immediate benefit to its holders. But we have never heard it contended that any species of productive property should, upon principles of justice, be excused from regular *pro rata* of taxation. Upon the several grounds that unproductive mines are of no certain value, were unable to pay taxes whilst they produced no income, and that it was impolitic to check mining development by taxing claims which paid nothing, the constitution was so framed as to tax the proceeds of mines rather than the mines themselves. It will hardly be contended that the intention of this provision was to exempt paying mines from their regular *pro*

rata of taxation. We do not understand respondents as arguing that paying mines should not so pay; but they contend the law and the constitution, as interpreted by this court, makes them pay more than their just proportion.

First, they complain that the mine has to pay four times a year, and other property is assessed only once. But the miner does not pay four times a year on the same property. He only pays the regular *pro rata* tax on the whole annual proceeds of the mine. If that tax was paid in installments every evening, making three hundred and sixty-five separate and distinct taxes paid annually, it would make the tax no greater than if all were paid at once. The tax is an annual *ad valorem* tax on the whole proceeds of the mine. That it is paid in four quarterly installments instead of one annual payment does not increase the burthen on the mine. The only possible difference it could make to the miner paying it in one or four installments would be in regard to interest. One who had to borrow the money to pay his taxes would have to pay a little more interest for the money if he paid one fourth of them at the end of each quarter of the fiscal year than if he paid the whole at the end of the year. But as the revenue law is arranged, the payment of taxes on the mines for the first quarter of any fiscal year is not due until say about the first of June, the second quarter the first of September, and the third the first of December, and the fourth the first of March following; the average time about the middle of October. This is about the average time for the payment of the annual taxes. So the mines are not worse off on interest account than other taxpayers. Look at this in another light. The mines pay on the products of the mine in lieu of the mine itself. Let us see if the annual products of the mine are usually worth more than the mine. We will take the Savage for an example, as that for several years past has probably been the most regular in its yield, and has perhaps fluctuated as little in price as any of the mines. For the quarter ending the thirtieth of June, this mine yielded a taxable product on gold valuation of say $640,000 in round numbers. This would, if the yield equaled this much for each quarter, be a little over $2,500,000 in gold subject to taxation. But it is believed that this was over an average yield. In bad weather and with bad roads, the amount

crushed would fall short of this amount. Probably this mine has never yielded much over $2,000,000 gold valuation subject to taxation. When paying fair dividends, the value of the stock has ranged considerably above $2,000; probably the average has not been much, if any, less, and possibly more than $3,000 per foot, gold valuation. The mine contains eight hundred feet. Eight hundred feet, at $3,000 per foot, would be, $2,400,000. So that even this mine, in its most prosperous condition and paying the largest dividends, hardly pays as much by paying on all its products as it would have to pay if it paid simply a *pro rata* tax on the body of the mine.

If the calculation was made on nearly any of the other mines, it would appear that the mode of taxation is more favorable to them than if they paid on the body of the mine. It will be seen, then, that the paying mines do not often pay more, generally hardly so much, as other property, in proportion to their real value. Whilst they are non-paying, or producing no pay ore, they entirely escape taxation. The farmer, on the contrary, has to pay on the cash value of his land, although it may be entirely unproductive. So, too, the farmer pays not only on the land, but on the wheat and the other crops he raises on it. But it is said the farmer only pays once in a year, and all the produce taken off his land in the meantime escapes taxation. All products of the farm are annual, and if the assessor does his duty scarcely anything escapes taxation. If, when the assessor makes his estimate, there is a crop of hay, grain, potatoes or other vegetables growing on the land, it enhances the value of the land, and should go into its general estimate of value. If such crops are severed from the land then they are, or should be, assessed as other personal property. Indeed, it not unfrequently happens that the same article is assessed twice. Wheat, for instance, is assessed to the farmer, and the same wheat when manufactured into flour is assessed in the hands of the miller or merchant. These, however, are inequalities that no law can guard against. Certainly, the taxes as fixed by the constitution bear less heavily on the mines than on any other interest in the State, whilst they are most able to pay, and require the most protection from the laws, for it is well known that the amount of violence and crime is much greater in the mining than in the agricultural districts in pro-

portion to population, and the State is put to heavier expense on account of the crimes committed in the mining counties. The man who can see only injustice to the mines in the revenue law as now framed and interpreted, would never see anything but injustice in any system which required him to contribute his share to the public burdens. He would doubtless see much justice in a system that would excuse himself entirely, and throw all the burdens of supporting the State government on other classes.

We can not see any force in the second point made by respondent. As long as three dollars in gold will buy as much as four in paper, it will be useless to say to persons possessing common sense that the two things are equal, or that courts can not distinguish between them. There seems to be some sort of vague notion that because the government has made paper money a legal tender, it has attempted to make it equal in value to gold. But this is not so. If paper dollars were as valuable as gold dollars there would be no necessity of making them a legal tender. People would take them for debts without any law compelling them to do so. One great reason for making paper a legal tender was the great rise in the price of gold as compared with other articles. If the government had not made paper a legal tender, gold under the panic and increased demand caused by the war would have risen greatly in value, and the whole debtor class of the nation would have been ruined. The man who, before the war, had purchased a tract of land for $10,000, paid $9,000 down and gave a mortgage for only $1,000, would, under the joint effects of an increased demand for coin and a panic in the money market, have found himself unable to sell the whole for enough to pay the $1,000 mortgage. All civilized nations among whom the use of bank paper has been known, have occasionally been compelled to resort to some measure of this kind for the relief of the debtor classes.

But making paper money a legal tender for debts was not making it of the same value as gold, and nobody ever yet believed it could be as valuable as gold until it was at the pleasure of the holder convertible into gold. The difference in value exists. It is recognized by the general government in various ways, and all courts and legislatures must also recog-

nize and act on the existing state of things. Suppose A has one hundred bushels of wheat, and B, without authority, converts it to his own use. A sues for the wheat, and proves by two witnesses the ownership in himself, the conversion by B, and that the wheat was worth $2.80 per bushel, or $280 for the one hundred bushels. B introduces ten witnesses, who prove that the wheat was only worth $2 per bushel; can it be doubted for a moment that A would be allowed to cross-examine B's witnesses to show that the reason of the discrepancies in valuation was that defendant's witnesses valued the wheat in coin, whilst plaintiff's had valued it in paper currency? And would not the court, in such case, instruct the jury that they must take notice of the difference in value of the two kinds of currency, and assess the damages on a paper basis, because the defendant would, as a matter of course, discharge whatever judgment was given against him in that currency which was most easily attained, or, in other words, the cheapest in the market? If courts failed or refused to notice the difference in the two kinds of currency it would, in many instances, result in damage or loss. To take notice of and be governed by facts as they exist can not be wrong. There are two kinds of money of unequal value. To produce uniformity of assessment it was indispensable that the legislature should direct assessors as to the kind of currency on which they would base their estimates of value. The legislature has done its duty, and assessors must obey and respect the law.

Section 101 of the Revenue Act reads as follows: "Between the first Monday in January and the first Monday in February, also between the first Monday in April and the first Monday in May, also between the first Monday in July and the first Monday in August, also between the first Monday in October and the first Monday in November in each year, the county assessor shall ascertain by diligent inquiry and examination, the name, title, and location of all mines and mining claims in his county, from which gold and silver, or either, is extracted; and also the names of all persons, corporations, associations, companies, or firms, owning or claiming, or having possession or control thereof; and he shall then ascertain and determine, as provided in this act, the number of tons and the value per ton of all ores, quartz or minerals extracted for reduction from

the said mines or mining claims, as aforesaid, and shall list and assess the same to the person, firm, corporation, association or company extracting the ores or minerals as aforesaid, or owning or having possession, charge or control of said mine or mining claim. For the purpose of enabling the assessor to make such assessments, he shall demand from each person and firm, and from the president, superintendent, treasurer or managing agent of each corporation, association or company engaged in extracting minerals, quartz, or ores bearing gold and silver, or either, a statement, under oath or affirmation, of the total amount and value of all gold and silver bars and bullion received or produced from his or their mines or mining claim, from reduction of ores, quartz or minerals from his or their mines or mining claim, for the three months next preceding such demand of the assessor; also the number of tons from which said amounts were received or produced; also the value and number of tons shipped from the State for the three months next preceding. The books relating to or used in the transaction of the business of any person or firm, company, association, or corporation engaged in extracting ores, quartz, or minerals bearing gold or silver, or either, for reduction, shall, on demand of the assessor or his deputy, be open to his inspection. If any person, superintendent, officer or agent shall neglect or refuse, on demand of the assessor or his deputy, to give, under oath or affirmation, the statement required by this section, or shall neglect or refuse to give, on demand, access to the assessor or his deputy to the books, as aforesaid, such person, superintendent, officer, or agent, shall be guilty of a misdemeanor, and shall be arrested on complaint of the assessor or his deputy, and on conviction thereof, before a justice of the peace, shall be punished by a fine of not less than $100 nor more than $500, or by imprisonment in the county jail for not less than twenty days, nor more than three months, or by both such fine and imprisonment.

This section requires the assessor to ascertain, by diligent inquiry and examination, the names of mines, and also requires him to ascertain and determine, as provided in this act, the number of tons, value, etc., of ores.

For the purpose of enabling the assessor to make such assessment he is authorized to call for certain sworn statements, and

is also authorized to examine books, etc. There is not a word in the section requiring him to be governed by the sworn statements any more than by the books. There is no legal presumption that the sworn statements and the books may not disagree. Indeed, it could only have been on the supposition that these sworn statements might be false, imperfect or fraudulent, that the power to examine books was given to the assessor. If the statements were to be conclusive, why give the assessor power to go behind the statement and call for the examination of the books of mining companies? This part of the section means just what it says: that for the purpose of enabling the assessor to make a correct estimate of the value of ores, he may call for certain evidence. When that evidence is produced he must be governed by it as all persons are governed by evidence just so far as it is reasonable, consistent and not contradicted by other evidence of greater force or weight. But still it is only evidence, and the assessment is the result of the judgment of the assessor, founded on that evidence. The requirement that the value shall be ascertained as provided in this act, evidently has reference to the mode of allowance for the cost of working. In other words, the assessor, after having determined in his own mind the number of tons worked, and the yield of those tons for the last quarter, from the best evidence, and all the evidence before him or within his reach, must then proceed to fix the assessed value by deducting from each ton worked $18 if worked by wet crushing, or $40 per ton if worked by any roasting or smelting process. And under the amended law he must make all those estimates on the value of the ore in paper money, ascertaining from the best means within his reach the comparative value of coin and paper. The language of this section 101, taken in connection with section 99 as amended in 1867, which directs that all ores shall be assessed at their value when severed from the mine and deposited on the surface, and also directs the manner in which this value is to be ascertained by deducting the cost of the working from the yield of the ore, is too plain to admit of misconstruction. The first section of the act, in language as plain as can be used, directs the valuation to be made on a paper currency basis.

But it is contended that sections 107 and 123 show that it was intended that the sworn statements of the mining super-

intendents should be conclusive. Section 107 provides that the assessment rolls, after being completed, shall be delivered to the auditor, who, among other things, shall ascertain that the assessments entered therein shall comply with the sworn statement, and when no statement has been furnished, that fact is noted, and that the proper calculations and additions shall be made to complete the assessment roll. This section, however, does not authorize the auditor to make the assessment roll conform to the sworn statement. It does not in fact authorize the auditor to do anything but to make certain calculations. No doubt the reason for requiring the auditor to make this comparison was to detect any clerical mistakes that the assessor might have made in transferring the result of these statements to his assessment roll. How these mistakes or errors were to be corrected the law does not point out. Probably the opinion prevailed that the board of equalization could do it. But as that board only met once a year it is evident at least three quarters in each year could not be equalized. It is also evident that in framing this section the draftsman only had in view two methods of making assessment; the one from the sworn statements of owners or superintendents, etc., and the other in cases where there had been a refusal to give any statement.

And practically for long periods of time those might be the only kinds of assessments made. Probably no case ever has arisen, and for years no such case may arise, as to require an assessor to go behind such sworn statement. But the power to do so is clearly given in section 101, and the mere omission in section 107 to direct how the auditor shall proceed where that power is exercised by the assessor can not take away the power. The draftsman of section 107 simply omitted from that section a few words which were necessary to make it congruous with section 101. This omission only made a verbal incongruity; it in no way affected the efficiency of the law. The duty of the auditor in those cases where there was no clerical error was plain. He had to carry out the assessment as made by the assessor. If the assessment was based solely on the sworn statement, the auditor must carry out the figures as made by the assessor. If made as directed when no sworn statement was furnished, he must do the same. If based upon

the result of the quarter's work as shown by the books of the mining company or any other competent evidence, he must do the same. Doubtless it was intended that in every case where the assessor based his assessment on other testimony than the sworn statement it should so appear on his assessment roll.

In these cases, however, where the assessor professed to base his assessment solely on the sworn statement, it was clearly made the duty of the auditor to examine his calculations, to ascertain whether there were any errors in calculation, or clerical errors of any description. The greatest incongruity in this section is, that it does not direct how errors that are detected are to be corrected. Probably the draftsmen thought they might be corrected by the board of equalization, after being pointed out by the auditor. Section 123 prescribes the form of a complaint, and the draftsman again seems to have thought that all assessments must be based on sworn statements, except in those cases where the parties refused to make statements. But this incongruity can not take away from the assessor the power clearly given in section 101.

Sections 107 and 123 are both part of the old law as it stood in 1865, and have not been amended. Supposing now that they do show (and we only admit this for the sake of argument) that the legislature of 1864–5 did intend the sworn statement should be final. Section 106, which was amended in 1867, shows far more clearly that the legislature which amended the law that year did not contemplate the sworn statement should be final. It contemplated the assessor should exercise his judgment, and from that judgment there should be an appeal to the board of equalization. If the sworn statements of the parties themselves were to be conclusive, why allow an appeal to the board of equalization? To allow a party to fix his own taxes, without any power on the part of the assessor to interfere with his estimate, and then allow the same party to appeal from his own estimate, would be absolutely absurd. This section, 106, having been the latest amendment, must control any inference to be drawn from sections 107 and 123.

The present revenue law, altogether a piece of incongruous patchwork, amended at every session of the legislature in some sections, without making other sections conform to those

amended, is still clear enough and plain enough as to the proper manner of assessing the products of mines. The most essential things in the assessment are these: First. The ores are to be assessed at their value when severed from the mine and deposited on the surface. Second. All assessments are to be on a paper currency basis. Third. The assessment is not to be made until after the ores shall have been worked and the bullion extracted, so far as ores are concerned, which are worked in this State. Fourth. To produce uniformity in assessment, the value of all ores on the surface shall be ascertained and fixed as follows: The assessor shall ascertain what the ores from each mine for the preceding quarter did actually yield, and after having ascertained the true value in paper money of the actual yield, he shall deduct from the actual value of the yield eighteen dollars for each ton worked by wet process, and forty dollars for each ton worked by any roasting or smelting process, the remainder to be the estimated true value of the ore at the dump. To enable the assessor to find out the yield of ore, he is authorized to require written and sworn statements from owners, superintendents, etc., and he is also authorized to have access to their books to satisfy himself in these respects; and we have no doubt he may resort to any other legal evidence to satisfy his own conscience, where he doubts the truthfulness or correctness of these reports. Having ascertained the number of tons worked by wet and by dry process, and the gross yield, he must then ascertain the value of that yield in paper money. Exactly how he is to determine the difference in value between gold and paper money the statute does not point out, but he must do that from the best lights he has before him. Practically, there can be but little difficulty. The prices current in the daily newspapers show as nearly as may be the relative value of paper and gold. The average of these prices for the preceding quarter would be the true standard. Thus an assessment is made in May, 1867, for the proceeds of mines for the first quarter of that year. The average relative value of gold and paper from the first day of January to the thirty-first of March, 1867, both inclusive, would be the proper standard by which to fix the value of the products of the mines for that quarter. The value must be fixed upon the comparative value of money when

the mineral was worked, and not what it may be at the time when the assessment is made.

Taking these principles, let us apply them to this case and see what are the rights of the parties. The assessor called for the sworn statements which the law authorizes him to call for. Those statements are required to show, first, "the total amount or value of gold and silver bars * * * produced." The sample of statements given, that from the Savage mine (and all others are admitted to be like this), shows substantially the total amount and value of all bullion produced for the quarter ending June 30, 1867, to have been $1,102,718.39. This part of the statement is in conformity with the requirement of the statute, except it omits the word amount, and only uses the word value before the figures expressing the sum total. Then comes the direction that the statement shall show the moneys (meaning doubtless both the amount and kind of money) received from the sale of ores sent abroad. Lastly, the statement shall show the number of tons from which the several amounts have been received. In this case there was no ore sent abroad, so no question arises on this point. In regard to the number of tons worked, the statement shows distinctly what number were worked by each process. This is precisely what the statement ought to show. Then, in addition to these statements (which are all that the statute requires) there is a statement of the value per ton of the ore worked by each kind of process. This is wholly unnecessary—at least this part of the statement has no legal effect. It may be, and perhaps is, quite convenient, but it is mere surplusage, so far as the statute is concerned.

The first item of this statement which we have noticed (though it seems last in order in the statement itself) is the amount or value of the whole quarter's yield. The statute says the statement shall show the amount and value. If the amount is shown, it may be shown either in ounces and the fraction of an ounce, or in dollars and cents. By either expression you may show the magnitude, or in other words, the amount of a bar of bullion. Doubtless when we speak of bullion which, like all that is produced from our mines, is a mixture of gold, silver and baser metals, the most convenient method is to express its amount in dollars and cents. That

amount means, of course, dollars in coin. It has no reference to its value in paper. Then, if this statement had shown that the total amount of bullion received was $1,102,718.39, the most carping critic would not have questioned that it meant that value in gold and silver, and not in paper. The omission of the word amount and insertion of the single word value, when the statute requires both amount and value, leaves room for some carping criticisms as to what that value means. But we apprehend there is no substantial reason for doubt. The general, perhaps universal, custom west of the Rocky Mountains, is to sell bullion, and to quote it at its value in gold. The general custom of all mines is to make their dividends in gold and not in paper. All their accounts and statistics are kept in gold. This is a part of the history of the country and known to all intelligent persons. Besides, the statement omitted to use the word amount, which the statute expressly requires, and used only the words total value. This omission shows one of two things: that the superintendent who made out this statement (supposing him to have known the requirements of the statute, and we can not presume that he was ignorant of the law under which he was acting) either omitted the word amount, supposing value synonymous therewith, or else omitted it as a device to evade his duty. If he treated the two words value and amount as synonymous, as we have every reason to believe he did, then the total value meant the total amount and value in coin.

Knowing the great responsibility of the position of mining superintendents, and the necessity of the stockholders placing gentlemen of the highest character in such places of trust, we can not for a moment believe that any mining superintendent did or would resort to any trifling evasion in a case of this sort. We think the superintendent used the word value as synonymous with amount, as is constantly the case in common conversation and newspaper reports. When a newspaper says a bar of bullion contains so many dollars, we all understand it means coin dollars, and not the value of so many paper dollars. If we say a bar of silver bullion contains a hundred dollars, we mean it contains silver enough to coin two hundred half dollars at the United States mint. If we say of gold bullion it contains one hundred dollars, we mean it contains enough gold to coin

ten eagles or five double eagles. We think the superintendent so understood and so used the term. And so using it, he gave just as definite an understanding of the amount of the bullion as if he had given the number of ounces of gold and ounces of silver contained therein. And he gave it in more tangible and convenient form. If he had given the return in ounces of silver of such a fineness, and ounces of gold of such a fineness, it would have required a long calculation on the part of the assessor to have ascertained the number of coined dollars it would produce. The only defect in this certificate is the slight oversight in omitting the words "amount and" before the word "value." If, however—a supposition we are unwilling to indulge for a moment—the word amount was omitted as a device to evade the law, it was a very shallow one, and could not have deceived the assessor or any other man of common understanding and acquainted with the language and common usages of the country. It was the plain duty of the assessor to have treated this statement as a statement of the total amount of bullion realized from the mine. To this amount should have been added a sufficient percentage to fix the paper money value. From this gross amount should have been deducted $462,620, that is, $18 per ton on twenty-five thousand six hundred and ten tons, and $40 per ton on forty-one tons. This would have shown the amount subject to taxation.

We have simply taken the statement which was in the record as an example to show how the assessments should be made under the statute. This particular statement was one given in July, 1867, for the preceding quarter. For this quarter the assessor did make an assessment, and probably in good faith intended to perform his duty. He did reduce the returns in gold to a greenback basis. The only error he seems to have committed, was that he deducted the $18 and $40 (the cost of reduction) per ton, before the amounts were reduced to a greenback currency basis instead of after. In other words he allowed $18 per ton in gold for wet crushing and $40 in gold for the fire process, instead of eighteen and forty in paper currency, as we understand the law. This may have been the result of a want of judgment. The State officer prosecuting this suit will of course have to be the judge whether, under such circumstances, it is proper to prosecute a suit against the

assessor. It is a principle of law, however, that one who undertakes any employment must understand his duty, and this court can not excuse him for want of knowledge.

In regard to the assessment for the third quarter, the case is very different. In that case there was a deliberate, premeditated violation of the law. The testimony of the assessor himself in regard to the assessment for the second quarter of 1867, shows that he understood the law fully, and knew perfectly well what his duty was, except in one respect, and that was in making the $18 and $10 deductions in coin instead of paper.

The proof offered by plaintiff was amply sufficient to show that the assessor willfully refused to perform his duty, and should have been admitted. The judgment must be reversed and the case sent back for a new trial and further proceedings in accordance with the principles laid down in this opinion. The complaint, however, will certainly have to be amended before another trial. It seems that the bond given by the assessor is only for $2,500; so this suit is brought, it would seem, on the bond against the sureties for that amount, but damages are claimed against the assessor for $10,000. We know of no principle or practice by which a suit on a bond against A, B and C can be united with an action for damages against A alone.

The plaintiff will have to elect to prosecute the suit against the principal alone for the whole amount claimed, or against the principal and sureties for the $2,500. The two actions can not be united. Of course, if the action is prosecuted against the assessor alone, and a judgment obtained for official delinquency, this would not prevent a future action on his official bond, if the State were unable to collect the individual judgment.

LEWIS, J., concurring.

I concur with the Chief Justice in the views expressed by him upon the first proposition discussed, and in the conclusion at which he has arrived upon the last; but my interpretation of the law upon this point differs somewhat from the construction placed upon it by him. I am of the opinion that the

statute requires the statement furnished by the mining superintendents to show the amount, that is, the amount in weight of the pure gold and silver extracted from the ores. The word "amount," as used in the law, certainly does not mean the amount in dollars, for that would simply be a statement of the value, and the statute requires both the amount and value to be given. The statute also declares that the value of the ores shall be ascertained by the yield of gold and silver, no account being taken of the base metals; hence it seems to me that when the statute requires the "amount" of gold and silver bullion to be stated, it means the amount in weight; and as the pure gold and silver only are taken into account, the weight of those metals only is to be given, and the weight of each should of course be stated. Thus, when a statement is made out, the assessor may at once calculate the value per ton of the ores from the amount in weight of the gold and silver extracted therefrom. If the statement be made out in accordance with my views of what is meant by the word "amount" as used in the statute, it will never be necessary for the assessor to look beyond the statement, for when the number of ounces or pounds of pure gold and silver is given, it becomes a mere matter of mathematical calculation for the assessor to ascertain its value in paper currency. I am, however, inclined to believe that the statement is not conclusive on the assessor even when made out in conformity with the requirements of the laws; at least it is not when, as in this case, the most essential part of it—that is, the amount of the gold and silver—is not contained in it. The court below, therefore, erred in excluding the evidence offered by the State to prove that the valuation of the ores was in coin and not in the paper currency.

I concur in reversing the judgment.

JOHNSON, J.

On the one point discussed by Justice Lewis, I concur in both the reasoning and conclusions as therein expressed. Upon the other points discussed by the Chief Justice I concur in the conclusions attained and in the judgment of reversal.

THE STATE OF NEVADA, Respondent, v. THE MANHATTAN SILVER MINING CO., Appellant.

(4 Nevada, 318. Supreme Court, 1868.)

Unauthorized alteration in assessment roll. The assessor has no authority to make any alteration after the roll has passed out of his hands; and where such an alteration was made to correct a mistake: *Held*, that the roll in its original state was the proper assessment roll; that as it remained legible, as originally made, the unauthorized alteration did not avoid it; and that it was competent evidence on the alteration being accounted for.

Effect of alterations and erasures. No one can be deprived of the benefit of any instrument on account of an alteration or erasure, provided it appear that such erasure or alteration was made without the knowledge or consent of the party wishing to use the same, and it can be ascertained by any legal method how the instrument originally read.

Assessment roll in hands of collector can not be altered. Neither an assessor nor a district attorney can alter an assessment roll after the same has been turned over to the collector of taxes.

Transcript must show facts directly. To establish a fact so that the Supreme Court can act upon it, a transcript must show evidence introduced in relation to it, or an admission of it by opposite counsel, or a certificate of the judge who tried the case to that effect, or a positive statement of the circumstances as having in some way been shown on the trial.

[1] **State taxes need not be levied by county commissioners.** The levy of State taxes by the commissioners, though provided for in the revenue laws, is an idle ceremony, for the reason that the levy is made by the legislature.

County taxes must be levied by the commissioners. The amount of taxes for county purposes must be fixed and levied by the commissioners.

No equalization of taxes necessary where no injustice complained of. There is no necessity of an equalization of any assessment roll, unless some one complains of injustice in the assessment.

[2] **Complaints as to assessments on proceeds of mines.** A taxpayer on the proceeds of mines may complain of inequality of assessment upon him at any time before the taxes are collected or sued for.

Adjournments of meetings of county commissioners. The judges discuss the question as to the time when the meeting should be held, and the power of the commissioners after adjournment to revoke the order and meet at an earlier day.

Appeal from the District Court of the Sixth Judicial District, Lander County.

[1] Legislature can not *assess*: *House Bill No. 270, In re*, 9 Colo. 635.

[2] *Breeze* v. *Haley*, 13 Pac. 913.

The facts are stated in the opinion.

D. COOPER and WREN & CROYLAND, for appellant.

ROBERT M. CLARKE, Attorney General, and H. MAYENBAUM, for respondent.

By BEATTY, C. J.

This was an action brought to recover certain taxes alleged to be due the State and the county of Lander, from the defendant, on the product of mines for the first quarter of the year 1867. On the trial of the cause, plaintiff offered to introduce in evidence the delinquent list of the taxes on proceeds of mines of Lander county for the first quarter of 1867. Defendant objected to the introduction of this list on various grounds; among others, that it showed on its face that it had been altered, erased, etc., in many respects, and was not, therefore, admissible in evidence. This objection was reserved for argument. The assessment roll of the taxes on the proceeds of the mines for the same period was also offered, and the same objections urged to its admission.

It appeared in evidence that one Allen A. Curtis, agent of defendant, had made to the assessor the following report: "Statement of the amount of ores obtained from the mines of the Manhattan S. M. Co., of Nevada, and the net product of the same for the quarter ending March 31, 1867. North Star Mine, three hundred and seventy-four and one half tons, average net product per ton ($136.37) one hundred thirty-six thirty-seven one hundredth dollars." This report is accompanied with an affidavit in the necessary and prescribed form. The assessor in making his assessment or entry on the assessment roll from this report made several mistakes or blunders. The most material one was, that he made the entries so as to deduct $40 per ton from the reported yield of the ore, although that deduction had already been made by the agent of the mining company. So that in reality, $80 per ton was deducted from the gross yield of each ton of ore, thus diminishing the apparent amount due the State to the extent of nearly $400.

After the assessment roll had been sworn to as the law

requires, and turned over to the auditor, and by the auditor again returned to the county assessor for collection, this error was discovered, and the assessor, having first asked the advice of the district attorney, drew his pen across the assessment he had made to the defendant, wrote the word "error" on the margin of the assessment roll, and on another line made a new assessment to the defendant, in which it was attempted to make the assessment conform to the statement made by the agent of defendant. The original assessment, however, remained entirely legible, notwithstanding the erasure marks drawn upon it. It may be proper to remark here, that the district attorney claims that when he advised the alteration, he was under the impression that the assessment roll was still in the hands of the assessor as such, and had not passed over to the auditor.

The court finally, after argument, admitted the delinquent list and assessment roll in evidence, and gave judgment for the plaintiff for the amount of taxes due, as shown by the assessment roll when turned over to the auditor, but not for the increased amount arising from the correction made therein by the assessor and ex-officio collector after the roll was given to him for collection.

The appellant contends the delinquent list and assessment roll should have been rejected as evidence, because of material alterations made in them by the agent or agents of the State, and because the assessment roll offered in evidence was not the same assessment roll sworn to as correct, and turned over by the assessor to the auditor, and by him again to the assessor and collector. In other words, it was not the same roll because it had been altered, added to and erased after it came into the auditor's hands.

Whatever the doctrine may once have been in regard to deeds (and there was in this respect a wide difference between deeds and instruments not under seal), it is now well settled that no one can be deprived of the benefit of any deed, instrument, contract or written evidence, merely because the same has in any particular been erased or altered; provided, that erasure or alteration was made without the knowledge or consent of the party wishing to use the same, and it can be ascertained by any legal method of arriving at the knowledge of

that fact, how the instrument read before the erasure or alteration. Neither the district attorney nor the assessor was the agent of the State to alter an assessment roll in the hands of the ex-officio collector. Their acts were wholly unauthorized, and did not in any way affect the interest of the State or of Lander county; hence, the alteration is as if done by a mere stranger.

The papers were properly admitted in evidence. The objection that the delinquent list is not properly certified by the auditor, is not available in this court, if, indeed, there is any such defect; for the list itself is not contained in the record, nor any statement showing that there was a want of certificate, or that it was defective in any respect. The mere fact (and this is all the statement shows) that appellant objected to the list because of its not being "properly authenticated, in that no certificate is entered therein, or attached thereto," etc., does not prove the want of certificate. Counsel frequently object to a paper because of some alleged defect which only exists in their imagination. A lawyer may assign any reason he pleases for objecting to the introduction of a paper. The court in settling a statement could not say such reason had not been assigned, although it might be convinced it was not founded on any existing facts. If counsel wish to establish a fact on which this court can act, they must do it by the introduction of evidence, the admission of the opposite counsel, a certificate of the judge who tried the case, or a positive statement of the circumstances as having in some way been shown on the trial. Had there been a direct allegation in the statement of facts in this case that when the delinquent list was offered, it had (as appeared by inspection) no certificate of the auditor attached to it, this would have been a sufficient showing on this point, for if there had been such certificate the respondent could have amended the statement in this particular before the same was settled. But respondent can not ask the court below to alter the reasons assigned for a motion or objection by the appellant, although statements not founded in fact may be mixed up with these assignments of grounds for a motion. As the facts on which this objection are based are not before us, we have not entered into any consideration of the question whether it would have been a valid objection if founded in fact.

The law of 1867 amending the revenue law requires the board of county commissioners to levy the annual taxes before the third Monday in April of each year. That act was not passed until the 2d of April, 1867; the third Monday of April of that year came on the fifteenth of the month. So that the last secular day on which the levy could be made was on Saturday, the thirteenth. The board of county commissioners of Lander county had met for the transaction of business, at a time prescribed by law, to-wit, Monday the 1st day of April. That day they adjourned to Saturday, the 6th of April, and again on Saturday the 6th of April, adjourned to May the 6th. On Monday, the 8th of April, the persons composing that board met and entered an order directing a special meeting of the board to be held on Saturday the 13th of April, to levy the county and State taxes. This order was advertised from that day until the thirteenth in a newspaper, but of course this was less than one week. It is now claimed that the levy of taxes was illegal, for the reason that less than one week's notice was given of the time of this special meeting of the commissioners. In the first place, as it regards State taxes, it appears to us the levy of them by the county commissioners is a perfectly idle ceremony. It is true the legislature requires it to be done, but affixes no penalty to a failure to perform the duty. The levy is made by the legislature, and what good it can do for the county commissioners to re-make that levy, or what harm it would do to omit to make it, we are at a loss to understand. The constitution has required the legislature to provide for a uniform rate of taxation throughout the State. When the legislature has done its duty we feel very certain that the tax could not be defeated, either in any particular county or throughout the State, by the delinquency of any board of county commissioners. In regard to county taxes the case is somewhat different. The legislature only fixes a maximum beyond which the county commissioners shall not go. Within these bounds they are supreme, and must fix the amount of taxes for county purposes. Probably without the proper action of the commissioners no county tax could be collected. But have not the county commissioners acted, and acted properly, in that respect? The law says they shall levy the tax prior to a certain

date, and they did levy it prior to that date. But, says appellant, their action in this respect was a nullity, because the meeting of the board at which the levy was made was a nullity. They had no authority under the law to meet at that time. Section 3 of the act of 1864–5, in relation to the county commissioners, requires them to meet on the first Mondays of January, April, July and October of each year, and continue (adjourn) from time to time until all the business before them is disposed of.

Section 4 provides for calling a special meeting at any time after a final adjournment of a regular meeting. Among other things necessary to make such special meeting regular, the clerk must advertise or post notice of such meeting for at least one week previous to the time of meeting. This section 4, it will be observed, refers to special meetings to be called after a final adjournment for the term. When this law was passed the board of commissioners of Lander county had not adjourned for the term, and therefore section 4 does not have any application to the case. But it may be claimed that if the meeting could not be called under section 4 of the Commissioners Act, then there was no law at all under which the board could meet. We think differently. This act was passed on Tuesday, the second of April. This was the day after the regular quarterly meeting of the board of commissioners in the several counties of the State. These boards are required to make their assessments before the fifteenth of April—practically on or before the thirteenth of the month. In the regular course of travel by stages and express the act could not reach the more distant counties before, say, from the seventh to the tenth of the month. There was then no opportunity of advertising for one week before the meeting of the boards in such counties. Yet they are positively required to meet and make these assessments. We think this is clearly a legislative dispensation with act of advertising. The board needed no other authority for its meeting at the time it did meet than the legislature requirement that it should perform this duty before a certain day. Again, whilst a board of this kind after final adjournment is powerless to meet or transact any business until the next regular term, unless the meeting is called under some special grant of power, we are by no means satisfied

that the same rule exists where there has only been an adjournment for a limited period within the term. We are not satisfied but that in such case the board has it in its power to set aside or alter the day of adjournment so as to make the next meeting of the board on a different day.

Another point made by appellant in this case is, that the board of county commissioners, acting as a board of equalization, had never equalized the assessment of taxes on mines for the first quarter of 1867, and that those against whom such taxes had been levied had had no opportunity of having the same equalized, because the board had never been in session from the time the assessment roll was delivered to the auditor until it was returned to the assessor or *ex officio* collector. The law does not require the assessment roll to be equalized unless some one complains of injustice to himself in the assessment made by the assessor. We see no constitutional requirement that the board of equalization should act on such roll. There is no reason why an assessor should not make the assessment for taxes as regular and equal as it can be made by the board of county commissioners. In regard to assessments for taxes on mines it is a mere privilege on the part of the taxpayer, of which he may avail himself at any time before the taxes are collected or sued for. The law does not fix or limit the time. It would doubtless be more convenient for all parties to have equalization made, if any is asked, whilst the list is in the hands of the auditor. But a party is not by law limited to such time: Stat. 1867, Sec. 4, 161. We presume the application might be made within reasonable time. If made before suit is brought it would not probably be held that the petitioner had lost his right to have the assessment equalized by undue *laches*. In this case there was no application for any equalization. There is, then, nothing in the point that the assessment roll was not equalized.

It is urged that this tax is unconstitutional because the legislature is restricted for a period, not yet expired when this act was passed, to an *ad valorem* tax of one and one-quarter per cent. per annum for State purposes, and this tax is for five per cent. per annum on the proceeds of the mines. We can hardly consider such a proposition as this seriously made. We held in the case of *The State* v. *Eastabrook*, 3 Nev. 173, first, that

all *ad valorem* taxes must be of a uniform rate or percentage. Second, that the constitution subjected the proceeds of mines, in lieu of the body of the mines, especially to an *ad valorem* taxation, and that it meant not a part, but the entire proceeds of such mines. Now, if the entire proceeds of the mines for each fiscal year are to pay an *ad valorem* tax of one and one-quarter per cent., we can not see how it can possibly increase the percentage paid, to require this sum to be paid by the owner of the mine in four quarterly installments instead of being paid all at one time. The amount to be paid to the State would not vary by the fraction of a mill whether it were paid in one payment or in four installments. How, then, can it be said that paying it one way would be an annual burden of one and one-quarter per cent. on property, and the other way of five per cent.? Let us illustrate. The State levies, we will say, an *ad valorem* tax of one per cent. on all real estate within its jurisdiction. The levy is made in August, and the law requires the taxpayer to pay what is assessed in four monthly installments, say in September, October, November and December. A citizen has a house and lot which is worth $1,000. The one per cent. on this property amounts to $10 and this is all he has to pay. If he pays this at one time he only pays one per cent. annual tax. But if he pays it in four monthly installments of $2.50 each, according to the argument in this case, he pays an annual *ad valorem* tax of four per cent. Stated in this way the proposition is simply ridiculous. Between this latter proposition and the one stated by counsel there may be a difference in form, but none in substance.

The last proposition of appellant is, that the law is not retrospective in its terms, and can not have a retroactive operation. The proceeds of the mines for the first quarter of the year 1867 having been already extracted, and a part of them realized and transported from the State before the law was passed, it can not be held to operate on those proceeds. The constitution, as we have heretofore interpreted it, requires the legislature to have assessed and collected an annual *ad valorem* tax (equal to the annual *ad valorem* tax on other property) on the entire proceeds of the mines. The law of 1864–5 imposed an *ad valorem* tax of one and one-quarter per cent. for State purposes on all taxable property in the State, and

also allowed the county commissioners to levy a tax not to exceed one and one-half per cent. for county purposes. This section was amended in 1866, and again in 1867, but the amendments do not in any way alter the burden or amount of taxation. The old law and the new law alike require and authorize the collection of the same amount of taxes. The amendments of 1867 only provided more specific directions for the mode of assessing and collecting these taxes. The legislature could not, if it would, exempt any part of the proceeds of the mines for the fiscal year 1867 from taxation, without a palpable violation of the constitution. In the amendments made to the revenue law in 1867, it directs certain things to be done for the purposes of ascertaining the value of the taxable property in the State during that fiscal year. The law, it is true, was passed, or amended, after the commencement of the year, but the whole object of the law was to fix the mode of assessment for that and future years. It could not assess part of the property liable to taxation in 1867 without assessing all. It was clearly and unmistakably the intention to assess all. That intention is sufficiently apparent from the language of the amendments, and must be carried out, even though the act were to some extent retroactive. But, according to our views, the act does not come within the class of acts commonly called retroactive. It was an act to affect the mode of collecting taxes for the year within which it was passed. It did not provide for the collection of any taxes which would have been payable before the passage of the amendments—it did not provide for the doing of any act which would otherwise have been done before the amendments were adopted except the making of an assessment by the board of county commissioners, and that assessment it required to be made over under the amendment. It undid nothing; it annulled no former act except the county assessment; it only required that the assessments thereafter to be made should be made in a different manner from what they had heretofore been made. The taxes thereafter to fall due were to be collected in a somewhat different manner. The mere fact that some of the property on which these taxes were to be collected had been removed from the State before the passage of the amendments could not give a retroactive character to the act. The prop-

erty, whether removed or not removed before the change in the revenue law, was subject to its annual tax. This amended law neither takes away nor impairs any vested right; it creates no new liability or obligation on the taxpayer, and does not come within the definition of a retroactive law. Sedg. Stat. & Const. Law, 188 *et seq.*

Judgment affirmed.

JOHNSON, J., (with whom was LEWIS, J.) filed a concurring opinion.

THE ATTORNEY GENERAL v. BAY STATE MINING CO.

(99 Massachusetts, 148. Supreme Judicial Court, 1868.)

[1] **Special tax on stock of foreign mining corporations.** The tax of a certain percentage upon the par of its capital stock imposed upon foreign mining corporations "having an office or place of business within this Commonwealth" is not in conflict with the State or United States Constitution; nor was the section imposing such tax in any respect annulled by the statute of 1866, c. 291.

Information filed December 13, 1867, on the St. of 1865, c. 283, § 14, at the relation of the treasurer and receiver-general of the Commonwealth, seeking a decree for payment by the defendants, a corporation organized under the law of Michigan, for the purpose of engaging in the business of mining copper in that State, of taxes in 1866 and 1867 under the St. of 1865, c. 283, § 8, the material part of which is printed in the margin;[2] and for an injunction against further prosecution

[1] *San Francisco* v. *Mackey*, 22 Fed. 602.

[2] "Every corporation chartered by this Commonwealth or organized under the general laws for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth, and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares, shall, semi-annually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively, of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one twentieth of one per cent. upon said capital stock at the par thereof."

of business in the Commonwealth by the defendants, until the same should be paid with interest.

The information alleged the maintenance by the defendant corporation of an office or place of business, namely, the office of its treasurer, in Boston, for the direction of its affairs and transfer of shares; and the making of returns by its treasurer to the tax commissioner in June and December, 1866, and June, 1867, in conformity with the statute; that in truth and fact the par value of its capital stock was fixed on May 1, and November 1, 1866, and May 1, 1867, was as thus returned, and that "by reason thereof said corporation became liable and was bound to pay to the treasurer of the Commonwealth" the taxes alleged, being one twentieth of such par value at the three dates last named.

The answer substantially admitted the facts alleged in the information, but denied "that said corporation owes the taxes mentioned in said information to said Commonwealth and interest thereon, or any part of said taxes and interest, or is or was liable and bound to pay to the treasurer of said Commonwealth said taxes;" alleged that the defendant corporation "is a foreign corporation owning real estate in the State of Michigan, and employing its capital stock in the working of a mine in said State; that said capital stock is owned in part by citizens of States other than the State of Massachusetts; that nearly all the contracts for labor at said company's mine and for materials purchased for use at said mine are entered into in Michigan, and drafts for the payment of the same drawn by the agent of the company at the mine on the treasurer of the company residing in Boston are delivered to and received by the laborers and parties furnishing materials as payment;" further denied "that said Commonwealth has the right or power, under the Constitution of the United States, or under the Constitution of said Commonwealth, to tax said corporation, said corporation being a foreign corporation and receiving all its corporate powers and privileges from the State of Michigan;" and finally alleged "that the provisions of said St. of 1865, c. 283, so far as it is pretended that the same are applicable to said defendants in requiring the payment of a tax to the treasurer of said Commonwealth, are repealed by the provisions of the St. of 1866, c. 291."

The case was reserved by FOSTER, J., on the information and answer, for determination by the full court.

C. ALLEN, Attorney General, and J. C. DAVIS, for the Commonwealth.

J. C. JACKSON, for the defendants.

WELLS, J. The defense in this suit seems to rest upon the supposition that the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are alone what constitute the franchise or "commodity" which is the subject of the tax or excise imposed by the St. of 1865, c. 283. If it were so there would be much force in the argument that, when these are derived exclusively from the authority of another State, they are not proper subjects of State taxation here.

But we think this is a too limited view of the matter. It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature which entitles the State to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without especial powers or privileges, may be equally subjected to such taxation under the constitutional authority to "impose and levy reasonable duties and excises." It was so considered in the case of *Portland Bank* v. *Apthorp*, 12 Mass. 252, and the tax of one per cent. laid upon the capital stock of the bank was justified upon principles equally applicable to individuals transacting similar business, and to brokers, factors, auctioneers, etc. The tax was not sustained on the ground that the corporation derived its existence from the State which imposed the tax; on the contrary, one principal question in that case was whether, by the charter, the State had not conferred upon the bank the privilege of doing the business for which it was created, without restriction, so as to exempt the corporation from the requisition of any tax or duty afterward levied upon the exercise of that privilege.

That decision is sufficient for the present case. The tax is, indeed, in form, levied upon the capital stock of the corporation. But it is not merely the franchise of incorporation

that is the basis of the tax; nor is it the capital, regarded merely as property. In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business: *Com.* v. *Hamilton Mfg. Co.*, 12 Allen, 298.

When the exercise of corporate functions, authorized by the State, is extended beyond the limits of the State, as in railroads and telegraph lines, the tax is apportioned accordingly. In the case of mining companies whose mines are without the State, the tax is limited by the "par" of the stock; and the tax upon foreign companies is founded upon the express consideration of "having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares." A mining corporation which comes within the terms of this provision has its domicile of business within the Commonwealth, as completely as one that is organized under our general statutes for the prosecution of a like enterprise. A corporation which seeks, by its agents, to establish a domicile of business in a State other than that of its creation, must take that domicile, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. The State may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law, as has long been done in relation to insurance companies: *Erie Railway* v. *New Jersey*, 2 Vroom, 531. The provisions of the statute in question are founded upon this right of exclusion or of conditional admission. Exclusion is the remedy provided to enforce compliance. The very defense to the suit implies the enjoyment of valuable rights and privileges within the Commonwealth, which a foreign corporation can only exercise by comity and the permission of the State.

The court are all of opinion that the tax upon the defendant corporation is legal; that it is warranted by the Constitution of the Commonwealth, and is not in conflict with any pro-

vision of the Constitution of the United States; and that § 8 of the St. of 1865, c. 283, is in no respect repealed or annulled by the St. of 1866, c. 291.

The Commonwealth is therefore entitled to an injunction restraining the further prosecution of the business of the defendant corporation within the Commonwealth, excepting the payment of debts already contracted, until all taxes due under said act shall be paid with interest and costs.

THE PEOPLE v. THE BLACK DIAMOND COAL MINING CO

(37 California, 54. Supreme Court, 1869.)

[1] **Mining claim taxable—California Enabling Act.** A mining claim on the public lands of the United States is taxable to the claimant without violation of the clause of the act admitting California into the Union, which prohibits taxation of the lands of the United States.

Exemption Act construed to be void. The General Revenue Act of California, in so far as it attempts to exempt possessory claims and improvements upon the public mineral lands from taxation, is void.

Appeal from the District Court, Fifteenth Judicial District, Contra Costa County.

This was an action to recover delinquent taxes. The people had judgment, and the defendant appealed therefrom, and from an order denying its motion for a new trial.

The other facts are stated in the opinion of the court.

THOMAS A. BROWN, for appellant.

H. MILLS, District Attorney of Contra Costa County, and Jo. HAMILTON, Attorney General, for the people.

By the Court, RHODES, J.

The property assessed is described as "the possession and interest of the Black Diamond Coal Mining Company, of, in

[1] *Forbes* v. *Gracey*, 14 M. R. —

and to those certain tracts of land situate," etc.; and it is alleged in the complaint that "the said possession and claim to said lands are valued and assessed at forty thousand dollars." The title to the land is in the United States, and the land was used by the defendant for coal mining purposes.

It was held in *People* v. *Shearer*, 30 Cal. 656, *People* v. *Frisbie*, 31 Cal. 146, and *People* v. *Cohen*, 31 Cal. 210, that the possession of and claim to public land was property, and as such, was taxable to the claimant, without violation of the act admitting the State into the Union.

The appellant's position, that the property is not taxable because property of that character is exempted from taxation by the General Revenue Act, is answered by *People* v. *McCreery*, 34 Cal. 433, and *People* v. *Gerke*, 35 Cal. 677, and it is unnecessary to repeat the argument here. Either the exemption is void, or all the provisions of the act levying an *ad valorem* tax upon property are void. We held the exemptions void, and that it was the duty of the assessor, notwithstanding the attempted exemption, to assess the property.

Judgment affirmed, and remittitur directed to issue forthwith.

THE COMMONWEALTH v. THE PENN GAS COAL CO.

(62 Pennsylvania State, 241. Supreme Court, 1869.)

Income—Exhausted coal. The value of the coal exhausted of the *capital* of a coal company is not to be deducted from the receipts in estimating its net earnings.

Net earnings defined. The net earnings of a company on which tax is to be assessed under the act of April 30, 1864, are the product of the business, deducting the expenses only.

Error to the Court of Common Pleas of Dauphin County.

On the 11th of July, 1867, the accounting officers of the Commonwealth settled an account against The Penn Gas Coal Company, as follows:

"For tax on net earnings or income, per act of April 30th, 1864, for years ending November 1st, 1865 and 1866, as per report herewith filed:

1865.	Net earnings or	income.....	$173,079.72
1866.	do	do	68,757.54
			$241,837.26

Tax three per cent. due Commonwealth ..... $7,255.11"

The company appealed from the settlement, because the amount, $241,837.26, on which the tax is charged, exceeds the net income and includes a portion of the company's capital.

On the trial, November 23, 1868, the Commonwealth gave in evidence the settlement, and the report of the company on which the settlement is based, showing the net earnings or income to be $241,837.26, and claiming a deduction of $54,000 for "waste of capital for coal taken out;" three per cent. tax being assessed on total amount returned.

PEARSON, P. J., directed a verdict for the Commonwealth for $8,374.56, the amount of the tax and interest, subject to two points reserved, the first being: If the court shall be of the opinion that under the return made, the company is not taxable on its stock exhausted, then judgment to be rendered in favor of the Commonwealth for $6,564.89.

The court rendered judgment on the reserved point for the Commonwealth for $6,564.89.

The Commonwealth took a writ of error, and assigned the judgment for error.

L. W. SMITH and B. H. BREWSTER, Attorney-General, for Commonwealth: cited *Com.* v. *Ocean Oil Co.*, 9 P. F. Smith 61.

J. W. SIMONTON and J. C. KUNKEL, for defendants in error.

The opinion of the court was delivered, July 6, 1869, by READ, J.

We have carefully considered this case, and the reasoning of the learned judge in the court below, but we are unable to

see that the case of *Com.* v. *Ocean Oil Co.*, 9 P. F. Smith 61, does not govern the one before us. All capitals of mining companies, whether of coal, iron, copper, or tin, or silver or gold, and so of quarrying companies, whether of stone, marble or slate, are nominal, like those of petroleum companies, and fixed by their promoters at such large figures, that, by applying the principle contended for by the appellees, the whole annual income would have to be retained to supply the loss of capital, which would disappoint the stockholders of their dividends, and the State of her taxes. The difficulties pointed out in our former opinion, of adopting and applying any such principle to these companies, make it necessary to establish one general invariable rule—that the net earnings or income are the product of the business deducting the expenses only, upon which basis the settlement was made by the auditor general and the State treasurer.

Judgment reversed and venire de novo *awarded.*

THE STATE OF NEVADA, Respondent, v. EUREKA CONSOLIDATED MINING CO. ET AL., Appellants.

(8 Nevada, 15. Supreme Court, 1872.)

[1] **Taxes on proceeds of mines—When the "$15 per ton" exemption applies.** The act of February 28, 1871, for the taxation of the net proceeds of mines, (Stats. 1871, 87) in providing "that an additional exemption of $15 per ton may be allowed on all ores worked by Freiburg, or dry process," does not authorize an exemption of $15 per ton on all ores so worked in addition to the actual cost of working them, but only where such actual cost exceeds sixty per cent. of the gross yield.

Legislative intent of act to tax net proceeds. In the act for the taxation of the net proceeds of mines, the legislative intent obviously was, first, to tax the gross yield less the actual cost; second, to limit a maximum, beyond which not even actual cost should be deducted; in other words, to exempt only the actual cost, provided it did not exceed sixty per cent. of the gross yield in case of ores worked by wet process, and sixty per cent., together with $15 per ton, in case of ores worked by dry process.

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[1] Affirmed: *State* v. *Northern Belle Co.*, 13 Nev. 250, and *Same* v. *Same*, 14 M. R. —.

Omission of "dollar mark" in tax assessment roll. In an action to recover delinquent taxes on net proceeds where plaintiff was allowed to introduce the original assessment roll, notwithstanding there was no dollar mark attached to the figures purporting to indicate the amount of the tax and it was objected to on that ground: *Held*, that the fair presumption, in the absence of aught to the contrary, was that the figures in perpendicular columns in the form prescribed by statute indicated dollars and cents, and that the admission of the roll in evidence was not error.

Sufficiency of delinquent tax assessment roll. Where a delinquent assessment roll, objected to for want of the "dollar mark," had such mark prefixed to all the columns except the last, headed "total amount of tax," which, however, was added up and the mark prefixed to the sum total: *Held*, that such roll furnished sufficient legal evidence to enable a court to determine with certainty the amount of the tax, and that in a suit for delinquency such roll was all the plaintiff need introduce to make out a *prima facie* case.

Irrelevant matter in "statements" of proceeds of mines. Matters inserted in a statement of the proceeds such as is required to be furnished by the mining tax law, the insertion of which is not authorized by the statute, go for nothing, and the assessor is not bound to pay any regard to them.

Object of notice by assessor of unpaid taxes on mines. The written notice required by section 7 of the mining tax law, to be given by the assessor to parties engaged in reducing ores, is not a prerequisite to liability of the producer for the tax, but only intended to hold a party reducing ores extracted by others to the extent of the value of the ores in his possession when notified.

Quarterly collections. There is nothing in the use of the word "manner" in section 10 of the mining tax law, which provides that the collection shall be enforced in the same manner as on other kinds of personal property, to prevent the collection of such taxes quarterly—the word "manner" as there used does not mean "time."

Appeal from the District Court of the Sixth Judicial District, Lander County.

This was an action against the Eureka Consolidated Mining Company, and the possessory claims to the mines or mining claims known as the "Eureka Consolidated Mines," in the Eureka Mining District, Lander County, brought to recover the taxes imposed on the net proceeds of such mines for the quarter ending March 31, 1871. The complaint sets forth that the gross yield of those mines for that period was $107,262; that the deductions for costs allowed by law was $64,357.20, being sixty per cent. of the gross yield, leaving $42,904.80 as net proceeds subject to taxation; and demanding judgment for $1,244.24, as the tax on said net proceeds.

It appears from the statement furnished by the superintendent of the mines to the assessor, that the gross yield amounted to 2,998 tons worked by dry or roasting process, of the gross value of $107,262, and that the cost of mining, reducing and transportation exceeded sixty per cent., but he did not say how much. He then claimed to deduct sixty per cent., amounting to $64,357.20, and in addition thereto $15 per ton amounting to $44,970, making in all $109,327.20, or in other words a sum exceeding the gross yield. The defendants adopted this view of the matter, and claimed that they were not liable to any tax whatsoever. Other facts are stated in the opinion.

There having been a judgment in the court below for the plaintiff as prayed, and a motion for new trial overruled, defendants appealed from the judgment and order.

H. MAYENBAUM and C. R. GREATHOUSE, for appellants.

A. M. HILLHOUSE, N. D. ANDERSON, L. A. BUCKNER, Att'y General, and T. W. HEALY, for respondent.

By the Court, GARBER, J.

This action was instituted to recover the tax assessed on certain ores, under the provisions of the act entitled "An act providing for the taxation of the net proceeds of mines," approved February 28, 1871. The ores were extracted by the appellant during the quarter commencing January 1, 1871. The gross yield thereof was between thirty and one hundred dollars per ton, and (it will be assumed) they were worked by Freiburg, or dry process.

The appellant contended that the assessment should be made as follows: "From the gross yield of the ore, deduct the actual cost of extraction, reduction, etc.; or, if this exceeds sixty per centum of the gross yield, only deduct this percentage—then, from the remainder, deduct the additional exemption of fifteen dollars for each ton, and the remainder is subject to taxation." But the court decided that the maximum of deductions to be allowed is obtained by adding to sixty per centum of the gross yield fifteen dollars for each ton; and that subject to such maximum, the actual cost of extraction, etc., is

to be deducted from the gross yield, the remainder being subject to taxation; consequently, as in this case the actual cost did not exceed sixty per cent. of the yield, no portion of the asserted exemption of fifteen dollars per ton was allowed. We are clearly of opinion that the decision was correct.

The section of the statute upon the construction of which the decision depends, so far as it applies to ores of this description, enacts that all ores shall be assessed as follows: From the gross yield, there shall be deducted the actual cost of extraction, transportation and reduction or sale; and the remainder shall be deemed the net proceeds, and shall be assessed and taxed; *provided*, that in no case whatsoever shall the whole amount of deductions allowed to be made in this section from the gross yield exceed sixty per centum of such gross yield; *provided*, that an additional exemption of fifteen dollars per ton may be allowed on all ores worked by Freiburg, or dry process.

The intention of the legislature, the thought which this section expresses, is obvious. First, to tax the gross yield, less the actual cost; and, second, to limit a maximum, beyond which not even actual cost should be deducted. The grade of the ore and the nature of the process are material only as a means of arriving at what are to be deemed the net proceeds, to tax which is the avowed object. So, in fixing the limit of deductions, so as to approximate as near as might be the actual cost, these considerations became important; and, consequently, this limit was arranged on a sliding scale, varying with the grade of the ores and the nature of the process. It was so arranged because, and only because, experience had shown that the cost of reduction usually varies according to the same conditions. There is no more propriety in allowing the fifteen dollars per ton to be deducted, without regard to the actual cost, than in allowing the sixty per cent. to be so deducted.

It is argued for the appellants, that "The question is whether the last proviso means in fact an exemption. The words, *additional exemption* of fifteen dollars, certainly imply that there are some other exemptions; and, if we can discover these, the section is free from ambiguity. With Webster's definitions of 'exempt' and 'exemptions' in view, it is clear that the sixty per centum is not an exemption but is a limit

upon the exemptions made by the deductions for extraction, etc.; not being an exemption, the fifteen dollars can not, with propriety, be coupled with it as an *additional exemption;* and it follows, therefore, that the fifteen dollars is an exemption *additional* to those allowed to be made for the extraction, transportation, and reduction or sale of the ores." This is ingenious, but, we think, too partial and refined. According to Webster, "to deduct" may mean the same thing as "to exempt;" and whatever is deducted under the provisions of the statute, is *ipso facto* exempted or freed from the burden of taxation.

The enacting clause of the section is, that from the gross yield there shall be deducted the actual cost. This is the leading idea of the statute—the general rule proposed. The office of a proviso is to except something from the enacting clause, or to qualify or restrain its generality. *Per* Story, J., 15 Pet. 445. The last clause or proviso can not be read as if it were a substantive and distinct enactment. The statute is as if it read: "From the gross yield the actual cost *shall* be deducted, subject, however, to the two following qualifications and exceptions, viz.: such deduction shall not exceed sixty per centum of such yield, unless the ore is worked by dry process, in which case an additional deduction of fifteen dollars per ton *may* be made." The proviso does not abrogate the rule adopted by the enacting clause, but merely qualifies the generality of that rule, which otherwise would have allowed the deduction of the cost without regard to its amount. Whatever is deducted over and above the sixty per centum, is surely a deduction additional to that allowed to be made on ores worked by wet process. It is an additional exemption—an exemption of another portion of the actual cost.

The actual cost *must* be deducted, except as the statute otherwise expressly directs. By adding the sixty per centum to the fifteen dollars per ton, or, by adding to the amount allowed for wet process, the additional amount allowed for dry process, we get the amount which *may* be allowed on ores worked by the latter. Below this limit, there is nothing in the statute forbidding the deduction of actual cost. Above it, the deduction of even actual cost is expressly prohibited. While the sixty per centum is, in one sense, a limit upon the

exemptions allowed in all cases where the excepted process is not used, so equally is the fifteen dollars per ton a limit upon the additional exemption allowed in that specified case. In another sense, the sixty per centum may as well be termed an exemption of sixty per centum, as the fifteen dollars per ton an exemption of fifteen dollars per ton. For wet process is allowed an exemption of sixty per centum; for dry, an additional exemption of fifteen dollars per ton—the exemption consisting of actual cost in the one case, as well as in the other.

On the trial, the plaintiff offered as evidence portions of the original and delinquent quarterly assessment rolls. The defendant objected to their introduction on the ground "that there are no dollar marks placed to the figures and numbers purporting to indicate the amount of the tax due or assessed, or to any figures or numbers therein, and that it has no other marks indicating what is meant by those figures or numbers." The evidence was received and an exception taken. In support of this exception several authorities are cited. In *Lawrence* v. *Fast*, 20 Ill. 338, a judgment for taxes was offered in ejectment. It was rejected on the ground that it did not show the amount of tax for which it was rendered—that the use of the numerals without some mark, indicating for what they stand, is insufficient. The court said there was no mark, sign, or abbreviation in any way connected with the figures showing for what they stood. The figures were 2 48, written in a column headed "total." Breese, J., dissented, saying: "The form pursued by the collector is precisely the form given by the statute, and so is the entry of the judgment. It is certain to every ordinary intent that the figures in the proper columns indicated cents or dollars and cents. The most common man would so understand them, and would not be misled by them. The figures '2 48' must, of necessity, mean two dollars and forty-eight cents, or two hundred and forty-eight cents, which is the same. Mills are never expressed in that way. Courts of justice must draw the same conclusions from the same facts which the mass of the community would draw from them. Taking the columns with their headings and the figures in them as they stand, can any reasonable man doubt that dollars and cents or cents only were intended? I think

not. It is not certainty to every intent in particular that is required in such proceedings, but common certainty." In 31 Cal. 132, the rule established in 20 Ill. was followed and applied to a case where the assessment roll was offered to sustain a suit for taxes. There, in a column headed "valuation" was written "101,937 18." The court say: "It is necessary that there should have been a tax assessed, and that the amount be ascertained, otherwise there is no basis for a judgment to rest upon; that if the assessment is so defective that the court can not determine what is intended, it is insufficient as evidence to authorize a judgment; that a 'valid assessment' is the foundation of all subsequent proceedings." The same has been held in other California cases, all resting avowedly on the authority of the case in 20 Ill., and cases in 21 and 23 Ill., to the same effect. *Woods* v. *Freeman*, 1 Wallace, 398, also holds that a judgment for taxes similar to that rejected in 20 Ill., can not be introduced in ejectment. The decision is expressly placed upon the ground that the validity of the judgment depended upon the construction of an Illinois statute, and that, therefore, the interpretation already given to the statute by the highest judicial tribunal in that State must be followed.

By another statute of Illinois, one holding a colorable title to land might perfect it by continuing in possession for seven years, and also, during that period, paying "all taxes *legally assessed* on that land."

In *Chickering* v. *Faile*, 38 Ill. 342, one of the parties claimed title by such a payment. It was objected that the taxes so paid had not been legally assessed, because there was no word or character annexed to the valuation, to indicate the sum in dollars and cents. The question presented was, therefore, whether such is a *legal or valid assessment.* The court say, referring to their earlier decisions above cited: "In a proceeding to divest title by summary action, it has been held that such a defect in the judgment for the taxes rendered the sale void. But this is a different question. We are not prepared to hold that such an assessment is void, as, if it is, all the acts performed under the assessment would render the officers wrong-doers, and subject them to an action for taxes collected on the assessment, and the collector a trespasser

for distraining property for the collection of such taxes. We do not regard this omission as rendering the assessment illegal, nor the tax extended upon it, although there may have been nothing but the numerals to indicate its amount. We are not disposed to apply the want of a word or character to the numerals, to indicate the sum of taxes due, as a defect to anything prior to the application of the collector for a judgment against delinquent lands, and would not even apply it to the judgment, were it not that the judgment must find the sum for which it was rendered. To all of the proceedings prior to the judgment for taxes, all persons know what the numerals represent, the amounts, and act upon them accordingly. And persons might so understand in a judgment; but we understand the law to be inflexible, that the judgment must, in terms, find the sum due."

Elston v. *Kennicott*, 46 Ill. 202, presented the same question, and it was again affirmed that the want of the dollar mark is no defect to any matter or thing prior to the application for judgment. In this case the taxes were paid for six of the seven years, and the excuse for the failure to pay the assessment levied during the remaining year was, that the taxes for that year were not legally assessed—the roll not containing the dollar mark.

We have set forth all the authorities bearing on this question, to which our attention has been called, because there is much in them which goes far to justify the confidence with which counsel has pressed this assignment. Upon principle, we think the opinion of Judge Breese presents the more reasonable and common sense view of the question, especially as applied to the facts of this case. In the rolls admitted in evidence, the columns headed, "gross yield," "actual cost of extracting," etc., "total cost," "amount deducted," etc., "net yield," etc., and "total amount of tax," are each divided into two unequal spaces by ruled lines; the smaller space, on the right, being of the size to admit two figures, and containing throughout the roll only two figures on each line, while the larger space contains from one figure up to six, being evidently so ruled as to admit any number of figures likely to be called for to express the number of dollars in the largest assessments. By our statute (1861, p. 99) it is enacted that the money of account shall be

the dollar, cent and mill, and that all accounts in the public offices, and other public accounts, shall be kept accordingly, and that no proceeding shall be considered erroneous because the amount is computed in dollars and cents, omitting the mills. The form of the assessment roll, given in section 2 of the statute in question, also shows that it was contemplated that the amounts should be computed in dollars and cents only.

As matter of experience and habit, we also know that mills are usually disregarded in all these proceedings. The fair and reasonable presumption, in the absence of anything in such a roll as this to show the contrary, is that the figures in the smaller subdivision of the columns indicate cents, and those in the larger, dollars. The addition of the dollar mark would not make this more apparent. A sum of money, of course, is taken to be intended. By the statute of 1861 this can only be dollars, cents, and mills. The subdivision of the columns and the manner in which they are filled up unmistakably point to the rejection of one of these three denominations. Mills alone can be so rejected without rendering the proceeding erroneous. It was perfectly proper and legal for the assessor to omit these, and he is presumed to have done his duty.

Upon authority, it can not be claimed that either doctrine has become settled law by the rule of *stare decisis;* or that, against our sense of right, we are bound to follow these recent and not altogether consistent or harmonious adjudications of two of our sister States—and perhaps the most that can be claimed is a conflict. The cases cited all purport to follow the Illinois ruling, and according to that, as explained in the later adjudications, it was proper in making up the delinquent list, for the officer to assume that the numerals on the original roll represented dollars and cents, and to act upon them accordingly, by so designating them in the former. The delinquent roll is sufficiently explicit in this respect, according to all the authorities. See 33 Cal. 171. The dollar mark is prefixed to all the money columns except the last, headed "total amount of tax," and even that is footed up and the mark prefixed to the sum total. The delinquent roll, by the express terms of our statute, was all the plaintiff need have introduced to make out a *prima facie* case. The introduction of the original roll, though unnecessary, did not, under the Illinois doctrine,

destroy this case, for it proved a *valid assessment*, and so went to sustain the delinquent roll which furnished sufficient legal evidence to enable the court to determine with certainty the amount for which judgment should be rendered.

There is nothing in the point that the assessor was bound to assess the ores in conformity with the statement furnished him by the superintendent of the defendant. The only deductions entitled to a place in the statement were, by the express wording of section 2, those relating to actual cost. Matters inserted in the statement, the insertion whereof is not authorized by the statute, go for nothing. Besides, the deduction of $15 per ton made in the statement, only amounts to the superintendent's construction of the statute, and his assertion of a corresponding claim to exemption. If this is to govern, much time has been wasted in construing the statute.

The notice in writing required by section 7, is not a prerequisite to the liability of the defendant to the tax. Such notice is only necessary to hold a party reducing ores, extracted by others, to the extent of the value of the ores in his possession when notified. Equally untenable is the position that the tax can not be collected quarterly. As counsel say, the word "manner," in section 10, does not mean "time."

We do not see how the record can be construed as showing that the cost of extracting, transporting and reducing the ores exceeded sixty per cent. of the gross yield, or that the appellants made any such claim. The answer expressly admits and avers that said cost was sixty per cent. of such yield; and, though the statement of the superintendent gave the cost as *exceeding* the sixty per cent., there is no showing anywhere how much the excess was, and of course no claim could have been based thereon.

The judgment and order appealed from are affirmed.

By WHITMAN, J., specially concurring.

As I read the record in this case, the cost of extracting, transporting and reducing the ores of appellants exceeded sixty per cent. of the gross yield; so they claimed a further deduction, or, in the words of the statute, "additional exemption," of $15 per ton, because the working was by dry process.

This claim was disallowed by the district judge, as I understand the decision, upon the ground that no allowance could legally be made beyond sixty per cent. of the gross yield; holding the percentage specified in the statute to be in this case, as in every other, the maximum of deductions. This view I believe to be correct; and so concur in the judgment.

WEBER v. REINHARD AND EISENHARD, Supervisors, etc.

(73 Pennsylvania State, 370. Supreme Court, 1873.)

Special tax against particular mine owners upheld. An act provided that in addition to taxes then collectible, owners of ore beds in Upper Saucon township should pay to the supervisors 1½ cents for every ton of ore mined and carried away with teams over the roads in the township, to be paid at the end of each six months, and in default of payment to be collected as debts of like amount: *Held*, that the act was constitutional.

[1] **Inequality does not make tax unconstitutional.** The court can not pronounce a tax unconstitutional on the ground of its injustice and inequality. It infringes on that ground no provision of the constitution (of Pennsylvania).

Collection by action. It is competent for the legislature to provide for the collection of a tax by action in the courts.

Landlord liable. The owner of land had leased it for a term of years: *Held*, that he, and not the lessee, was liable for the tax.

Error to the Court of Common Pleas of Lehigh County.

This case was commenced March 5, 1870, before a justice of the peace, at the suit of James Reinhard and Benjamin Eisenhard, supervisors of Upper Saucon township, against Charles B. Weber, for the recovery of taxes imposed by the act of April 14, 1868.

The act provides: "That in addition to the taxes collectible under existing laws, the owner or owners of ore beds, situated in Upper Saucon township, Lehigh county, shall, from and after the passage of this act, pay to the supervisors of the roads in said township one and a half cent for each and every ton of

[1] *Silver Bow County* v. *Davis*, 12 Pac. 688.

ore mined and carried away with teams over the public road in said township, which said payments shall be made at the end of every six months after the passage of this act; and in default of payment the same to be collected as debts of like amount are collectible by law: *Provided*, That the said supervisors shall appropriate to the same purpose, and render an account in the same manner for the funds coming in their hands under this act, as they are required by law with respect to other funds coming to their hands by virtue of their office."

The plaintiff's claim was for iron ore carted from the ore beds of defendant over the public roads in said township, to wit: $37.02 for ore so removed up to October 14, 1868, and $38.08 for the same from October 14, 1868, to October 14, 1869, with interest, together amounting to $78.82. The justice entered judgment for the plaintiffs for $78.82, and the defendant appealed to the Court of Common Pleas.

The plaintiffs then filed an affidavit of claim, referring to the above given act of assembly and averring that "the defendant is the owner of an ore bed situated in said township; that since the passage of said act there has been mined and carried away with teams over the public roads in said township, from the ore bed of said defendant, the following quantities of iron ore during the times following, to wit: From April 14, 1868, to October 14, 1868, inclusive, 2,468 tons 13 cwt.; from October 14, 1868, to October 14, 1869, inclusive, 2,539 tons 13 cwt.; that the tax on the first mentioned quantity, 1½ cents per ton, is $37.02, and upon the last mentioned quantity is $38.08; that the tax due as aforesaid, after the same became due and before the bringing of this suit, was duly demanded by said plaintiff of said defendant, but that the said defendant has neglected and refused to pay the same or any part thereof; that the sums aforesaid, with interest from the time when they respectively became due as aforesaid, to date, (May 14, 1870,) to wit, $79.85, is now due and owing in manner aforesaid by said defendant to said plaintiff."

The defendants put in the following affidavit of defense: * * * "An act was passed by the legislature of Pennsylvania, and approved April 14, 1868, entitled 'An act authorizing the supervisors of Upper Saucon township, Lehigh county, to collect an additional road tax on ore beds,' enacting that the

owners of ore beds in said township shall pay to the supervisors therein one and a half cent for each and every ton of ore mined and carried away with teams over the public roads in said township. Said defendant is the owner of an iron ore bed in said Upper Saucon township, which he has let to the Bethlehem Iron Company by article of agreement dated August 18, A. D. 1864, and said ore bed has been ever since and is now, worked by said company, under said lease or article of agreement; said iron company mine and cart away all the ore raised from the ore bed on said farm, and the said defendant does not mine or cart away any of the ore, nor does he keep or own any teams or wagons or horses for the purpose of carting ore from said ore beds. The farm owned by said defendant in which said ore bed is situated and said ore bed are already separately assessed and taxed as follows: Said farm is valued for the purpose of taxation at $4,825, and said ore bed at $3,000. The taxes due and to be paid are as follows: Road tax on farm $19.30; on ore bed $12; school tax on farm $14.47; on ore bed $9; county tax on farm $24.12; on ore bed $15. According to the terms of said agreement with the said The Bethlehem Iron Company, said defendant has no control whatever over said ore bed, but the same has been leased to the said iron company for a period of twenty years, and the term of said lease has not yet expired; that at and before the time of bringing of this suit, said ore bed was and is now under the sole control, management and ownership of the said Bethlehem Iron Company, who dig, mine and cart away all the ore that is taken away therefrom.

"And further, said act of assembly, by virtue of which said tax is assessed, is null and void, because it is in violation of the Constitution of the United States and of the State of Pennsylvania."

The court (Longaker, P. J.) directed judgment to be entered against the defendants for want of a sufficient affidavit of defense, for the amount of the plaintiff's claim with costs.

This was assigned for error by the defendant on the removal of the record to the Supreme Court by writ of error.

E. J. MORE and WOODWARD, for plaintiff in error.—This imposition is an excise rather than a tax. There is no provis-

ion for assessment, and no provision for appeal from an assessment, however arbitrary. If an excise, it can not be enforced; if a tax it is so unequal and unjust, and its mode of enforcement so uncertain, the courts will refuse to carry it out: *Philadelphia Association* v. *Wood*, 3 Wright, 73; *Durach's App.*, 12 P. F. Smith, 491.

E. ALBRIGHT, for defendants in error.—In taxing things may be classified, and if the tax is on all of a class it may be composed of one or many: *Durach's App.*, *supra*. He cited also *Sharpless* v. *Philadelphia*, 9 Harris, 147; *Speer* v. *School Directors*, 14 Wright, 150; *Pittsburg and C. R. R.* v. *Com.*, 16 P. F. Smith, 73.

The opinion of the court was delivered by SHARSWOOD, J.

Hammett v. *Philadelphia*, 15 P. F. Smith, 146, was twice argued, each time before a full bench, and was a well considered case. The principle of it has since been re-affirmed in *Washington Avenue*, 19 Id. 352. It did not question the constitutional right of the legislature to confer upon municipal corporations the power of taxing properties benefited by local improvements for the cost of making or maintaining them, but placed upon it the just and salutary restriction that it should be limited to the special benefits conferred by the improvements, and not extend beyond them; that the legislature could not authorize a tax to be levied on particular property in a designated locality for a general purpose, to which the whole community ought equally to contribute. Such a tax was in effect only a mode of taking private property for public use without making compensation. An examination of the facts will evince that the judgments in those cases have this extent—no more. The opinion in Hammett's case had been published immediately after the first argument, though not reported until after the second. It was cited, and was the main reliance of the appellant in *Durach's App.*, 12 P. F. Smith, 491, which settled, however, the principle which seems to us to be decisive of the main question raised on this record, to wit, the constitutionality of the tax imposed upon the owners of ore beds in Upper Saucon township, Lehigh county,

by the act of assembly of April 14, 1868 (Pamph. L. 1127). It was there held that while the legislature can not, under the name of taxation, take private property for public use without compensation, and that therefore a special tax on individuals or particular properties would be unconstitutional, yet in the exercise of the power of taxation, persons and things may be legitimately classified—some kinds may be assessed and others not—and that even special exemptions are not unconstitutional. There is no provision in the constitution that taxation shall be equal. Sound policy requires that it should be so as far as possible. But perfect equality is not possible. Indeed, if this were necessary there could be no taxation, except such as would include every person and every thing, which would manifestly be impracticable and unjust.

It is gravely contended, however, that this court has the power to set aside unjust, unequal and improper legislation relating to taxation, and *Philadelphia Association* v. *Wood*, 3 Wright, 73, is relied on as establishing this position. There are many things contained in the opinion in that case entirely aside from the point decided, and therefore mere *obiter dicta*. All that was determined was that an act of assembly which required all agencies for foreign insurance, trust and annuity companies in the city of Philadelphia to pay two per cent. of their gross premiums to an association for the relief of disabled firemen, was not taxation at all; it was taking the property of A and giving it to B, whether for a charitable or any other mere private purpose it mattered not. No doubt after money raised by taxation has reached the public treasury it may be appropriated by the legislature to charities or individuals. It was admitted, indeed, that the tax in that case would be clearly constitutional, if it had been levied for and paid into the public treasury, and the idea that the court could pronounce a tax unconstitutional on the mere ground of injustice or inequality was expressly repudiated.

It has been urged, however, grounded upon an opinion expressed by Chief Justice Lowrie, in the case last cited, that it is not competent for the legislature to provide for the collection of taxes by action in the courts; that it would turn the courts into tax collectors. But all personal actions are processes for the collection of money, and the courts are no more

collectors of taxes in the one case than they are collectors of private claims in the other. It is the sheriff who is the collector when it is adjudged that the tax or debt is due, and surely there is nothing incongruous in that. He is the best and most efficient of all collectors, and never objects to the performance of that function, for he is well paid for it. All that the courts are required to do is to decide whether the debt or tax is payable by the defendant, and what the amount of it is. That is a purely judicial transaction. This mode of enforcing the payment of taxes may be unusual, but what provision of the Bill of Rights or of the constitution of government does it infringe? As well might it be maintained that fines, forfeitures and penalties could not thus be enforced, and of examples of these the statute book is full. So municipal liens for taxes and assessments have been collected by actions of *scire facias* in the courts, and no one has ever thought that it was unconstitutional. No doubt the legislature might provide a summary process in all cases of public claims. But what right has the citizen to complain if instead of this he is secured a trial by jury to ascertain his liability before he can be compelled to pay? He would have better ground to complain if it had been denied to him.

It is also maintained, and in this contention it must be admitted that there is much plausibility, that there are difficulties in carrying this act of assembly into execution, by reason of the want of any provision for the ascertainment and assessment of the amount payable by each owner of an ore bed. It would have been better if the legislature had provided that the owner should make a return of the number of tons hauled over the public roads, and in default of his doing so, authorized the supervisors to assess the amount. But can we set aside an act of assembly, because its machinery is lame and imperfect? Our duty is to execute the legislative will in the way prescribed, when that way is constitutional, though a much better way might have been devised. We are bound to give the act a reasonable construction, *ut res magis valeat quam pereat.* When the owner refuses or neglects to pay the tax, the legislature has imposed upon the township the burden of proving by evidence, satisfactory to a jury, all that is required to fix liability upon the owner of the ore bed. This

may be unwieldy, but it is surely not unjust to the taxpayer. He can save himself from the costs of a suit, by a tender, in time, of the amount actually due. It is not a case where a valuation of property is required. It is a fixed rate upon the number of tons, and that the owner may be presumed to know, or to have the means of ascertaining, whether he is a landlord, or himself the actual occupant. It is not, indeed, expressly provided that the supervisors shall ascertain and assess the amount. But they must do so in order to maintain their suit, and recover a judgment; and they must do more; they must prove it by competent evidence. In this case, as appears by the affidavit of claim filed, there was a demand of a certain sum, and the plaintiff in error did not deny in his affidavit that the amount was correct.

Nor can it be doubted that the plaintiff in error is liable for the tax. He admits himself to be the owner of the ore bed, and in the sense of tax laws of this Commonwealth, the owner of lands is always the landlord and not the tenant, when they are occupied under a lease. See act of April 6, 1802, Sect. 8; 3 Smith, 516; act of April 3, 1804, Sect. 6; 4 Smith, 203; act of April 15, 1834, Sect. 46; Pamph. L. 518; *Caldwell* v. *Moore*, 1 Jones, 58.

It is unnecessary to consider the contention that the imposition of this tax impairs the obligation of the contract between the landlord and tenant, for it is too clear for argument that a tax upon the subject-matter of a contract, by whichever party it is made payable, can never produce that effect.

Judgment affirmed.

READ, C. J., and WILLIAMS, J., concurred in this opinion, except as it relates to the extension of *Hammett* v. *The City*, beyond the case itself.

AGNEW, J., dissented.

THE JACKSON MINING CO. v. THE AUDITOR GENERAL.

(32 Michigan, 488. Supreme Court, 1875.)

[1] **Tonnage tax on ore, held void.** The statute (laws 1865, p. 244) imposing a specific tax upon corporations and companies engaged in mining, smelting and refining ores in this State, which provides for the payment of a tax of one and a half cents per ton on all iron ore or mineral obtained and exported from the State before being smelted, but exempts from taxation all that is smelted within the State, is held void as an attempt in effect to impose a tax upon interstate commerce.

Appeal in Chancery from Marquette Circuit.

This bill was filed to restrain the collection of the specific tax therein complained of, and was heard in the court below on demurrer to the bill, and the demurrer was sustained and the bill dismissed. The complainant appealed.

C. I. WALKER, for complainant.

ANDREW J. SMITH, Attorney General, and HARSEN D. SMITH, for defendant.

COOLEY, J.

The only question discussed in this case is that of the right of the State to collect the specific tax provided for by "an act imposing a specific tax upon corporations and chartered companies engaged in the business of mining, smelting and refining ores in this State," approved March 10, 1865: Laws of 1865, p. 244. The complainant is a corporation existing under special charter, and pays a tax on its capital stock which the charter imposed and to which the tax provided for by this act was to be additional.

The question arises upon the discrimination which the act of 1865 makes between the mineral mined and which is reduced within the State and that which is removed from the State before being smelted. All the former is exempted from taxation; all the latter is taxed one cent and a half per ton. Various objections are made to the act but we

[1] *Brown* v. *Houston*, 114 U. S. 623.

shall notice but one. That is, that such a tax is a tax on interstate commerce. It is so in express terms. It says plainly and specifically to these several companies, "for every ton of mineral mined by you, you shall pay one cent and a half for the privilege of transporting it from the State for reduction." The purpose is manifest; it is to induce the working up of the mineral within the State. But this is only an application of the doctrine of protection, not only as between the State and foreign countries but also as between the several States.

The decree must be reversed and the cause remanded, with directions to overrule the demurrer and leave the parties to such further proceedings as they may be advised to take.

GRAVES, CH. J., and CAMPBELL, J., concurred.

MARSTON, J., did not sit, having been concerned in the case.

FORBES v. GRACEY.

(94 U. S. 762. Supreme Court, 1876.)

Ore out of U. S. lands. Although the title to mineral lands may remain in the United States, the ores when dug or detached from the lands under a mining claim, are free from any lien, claim or title of the United States, and becoming personal property are, as such, subject to the State taxation in like manner as other personal property.

[1] **"Mines" and "mining claims" distinguished.** The words "mines or mining claims" in the sixth section in the act of the legislature of Nevada of Feb. 28, 1871, imposing a tax upon ores, and making it "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," were evidently intended to distinguish between cases in which the miner is the owner of the soil, and therefore has a perfect title to the mine, and those in which he works under a mining claim, the title to the land remaining in the United States. In the first case the tax is a valid lien on the mine itself; but in the second only upon his possessory right, under existing laws and regulations, to work and explore the mine.

[2] **Claims are taxable property.** A mining claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for the non-payment of them, without infringing the title of the United States.

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[1] *Waller* v. *Hughes*, 11 Pac. 122; *State* v. *Moore*, 14 M. R. 110; *St. Louis Co.* v. *Kemp*, 11 M. R. 673.

[2] *Hale Co.* v. *Storey County*, 14 M. R. 115.

Appeal from the Circuit Court of the United States for the District of Nevada.

The case is stated in the opinion of the court.

Submitted on printed arguments by Mr. HALL MCALLISTER, for the appellant, and Mr. W. E. F. DEAL, for the appellee.

Mr. Justice MILLER delivered the opinion of the court.

This was a suit brought by appellant to enjoin the collector of taxes for Storey county, Nevada, from collecting a tax imposed by the law of that State upon the property of the Consolidated Virginia Mining Company, the appellant being a stockholder in the company and an alien subject of the Queen of Great Britain. The tax is by the State statute imposed upon the proceeds of the mine worked by the corporation, and is resisted on the ground that the title to the land from which the mineral is taken is in the United States, and is not, for that reason, liable to State taxation.

The case is prepared and submitted to us on printed arguments in the very last days of the term, and we are urged to decide it on the ground that it involves a question of vast interest to all the mining operations in the Pacific States, and is of vital importance to the State of Nevada, as it affects her largest source of revenue. In view of its importance we should postpone the decision until next term, if the question presented were either doubtful or difficult of solution. We think a very few words—all we can give to the subject at this late day—will show that it is neither.

It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further and recognized the possessory rights of these miners, as ascertained among themselves, by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, Title XXXII,

Chap. 6, Sects. 2318–2352. But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the process of the State in its collection. A few extracts from the statute of Nevada showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the act of Feb. 28, 1871, imposing this tax:

"Section 1. All ores, tailings and mineral bearing material of whatever character, shall be assessed, for purposes of taxation, for State and county purposes, in the following manner: From the gross yield, return or value of all ores, tailings or mineral bearing material of wl atever character, there shall be deducted the actual cost of extracting said ores as minerals from the mine, the actual cost of saving said tailings, the actual cost of transportation of said ores, mineral bearing material or tailings to the place of reduction or sale, and the actual cost of such reduction or sale, and the remainder shall be deemed the net proceeds, and shall be assessed and taxed as provided for in this act: *Provided*, that in no case whatsoever, shall the whole amount of deductions allowed to be made in this section from the gross yield, return or value of said ore, mineral bearing material or tailings, exceed the percentage of gross yield, value or return of such ore, mineral or tailings, as hereinafter specified; on all ores, tailings or mineral bearing material, the gross yield or value of which is $12 per ton or less, the whole amount of deduction shall not exceed ninety per cent. of such gross yield, return or value; on all ores, tailings or mineral bearing material, the gross yield, value or return of which is over $12 and under $30 per ton, the whole amount of deduction shall not exceed eighty per

cent. of such gross yield, value or return; on all ores, tailings or mineral bearing material, the gross yield, return or value of which is over $30 and less than $100 per ton, the whole amount of deduction shall not exceed sixty per cent. of such gross yield, value or return; on all ores, tailings or mineral bearing material the gross yield, return or value of which is $100 per ton or over, the whole amount of deduction shall not exceed fifty per cent. of such gross yield, return or value: *Provided*, that an additional exemption of $15 per ton may be allowed on all ores, tailings or minerals worked by the Freiburg process."

"Section 2. It shall be the duty of the several county assessors within this State to compare and complete quarterly, on or before the second Monday in February, May, August and November, in each year, a tax list or assessment roll of the proceeds of the mines, alphabetically arranged in a book furnished them by the board of county commissioners for that purpose, in which book shall be listed or assessed the proceeds of all mines in their respective counties, as provided in this act."

"Section 6. Every tax levied under the authority or provision of this act on the proceeds of the mines, is hereby made a lien on the mines or mining claims from which ores or minerals bearing gold or silver, or either, or any other valuable metal, is extracted for reduction, which lien shall attach on the first days of January, April, July and October of each year, for the quarter year commencing on those days respectively; and shall not be satisfied or removed until the taxes, as provided in this act, on the proceeds of the mines, are all paid, or the title to said mines or mining claims is absolutely vested in a purchaser under a sale for the taxes levied on the proceeds of such mines or mining claims."

"Section 10. The collection of the tax authorized to be levied under this act, shall be enforced in the same manner in which the tax on any other kind of personal property is enforced and collected."

What is this manner of enforcement is to be found in section 110 of a previous statute, which reads as follows:

"At any time while the assessment roll of any quarter is in the hands of the assessor for collection, the assessor may

seize upon the personal property, or so much thereof as may be sufficient to satisfy the taxes and costs, of any person, firm, corporation, association or company who shall neglect or refuse to pay such taxes for one week after such demand of the assessor or his deputy, and shall post a notice of such seizure, with a description of the property and the time and place whereon it will be sold, in three public places in the township or precinct where it is seized, and shall, at the expiration of five days, proceed to sell at public auction, at the time and place mentioned in the notice, to the highest bidder for cash, a sufficient quantity of such property to pay the taxes and costs incurred."

From the first section of the statute we ascertain what it is that is taxed, namely, all the ores, tailings or mineral bearing material of whatever character, after deducting the actual cost of extracting said ores as mineral from the mines, and other expenses, such as transporting them to the place of reduction, etc.

From this it is clear that it is the ore after it has been separated from the bed in which it is found, and its proceeds and products, which are taxed, and not the ore or mineral in the earth. Indeed, this latter idea is not advanced by any one, and it would be preposterous.

As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is imbedded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim or title of the United States, and is rightfully subject to taxation by the State as any other personal property is.

The truth of this proposition is too obvious to need or admit of illustration or elaboration, and as we have already said, the pressure of business does not admit of it.

In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that there can be any reasonable ground for asserting that the United States has any interest in the tax or in the sale of the property taxed. It is, however,

urged with more show of reason, that section 6, which makes this tax "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," is an interference with the right of property of the government in the lands in which the mineral remains are extracted.

An examination of the language we have quoted will show that it was carefully prepared to avoid this objection, and we think it does.

The use of the words "mines or mining claims" is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts, and what is, as we have said, recognized by the act of Congress as a mining claim. In the first case the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other the tax is a lien only on the claim of the miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject.

In the former case, of course, the United States has no interest to be protected, and the State is at liberty to declare and enforce such a lien for her taxes. In the latter, also, such right as the mining laws allow and as Congress concedes, to develop and work the mines, is property in the miner, and property of great value. That it is so, is shown most clearly by the conduct of the mining corporation in whose interest this suit is brought, which, for the purposes of evading this tax, permit its investment in this mine, said to be worth from fifty to a hundred millions of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared to the value of the mine, obtain the government's title to the entire land, soil, mineral and all. Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast States. They are property in the fullest sense of the word, and their ownership, transfer and use are governed by well defined code or codes of law, and are recognized by the States and the Federal government. This claim may be sold, transferred, mortgaged and inherited with-

out infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it. We are of opinion that the decree of the Circuit Court dismissing the bill of appellant on demurrer was right.

It is therefore affirmed.

Mr. Justice FIELD took no part in the decision of this case.

THE HOPE MINING COMPANY v. KENNON, Treas.

(3 Montana, 35. Supreme Court, 1877.)

[1] **Silver bullion** is such property as is liable to taxation.

The exemption of mines from taxation does not extend to the product of such mines.

Exemption is the exception and taxation the rule.

[2] **Duplicate taxation.** The fact that the stock of a mining corporation is divided into shares and that these shares are subject to taxation, does not make the product of its property exempt; if such result amount to duplicate taxation it is not therefore invalid.

Appeal from Second District, Deer Lodge County.

This cause was tried in both courts upon an agreed statement of facts, involving only a construction of the statute.

SHARP & NAPTON, for appellant.

A. E. MAYHEW and W. W. DIXON, for respondent.

Even unjust and duplicate taxation is not invalid. Cooley, 160–3.

WADE, C. J.

The question involved in this appeal is whether or not

[1] See *Almy* v. *State*, 24 How. 169; *Brumagim* v. *Tillinghast*, 18 Cal. 266.

[2] *Ryan* v. *Leavenworth County*, 2 Pac. 157; see *San Francisco* v. *Flood*, Id. 264.

under the laws of this territory, that particular property known as base or crude silver bullion is subject to taxation. Bullion is defined to be uncoined gold or silver in mass. Properly, the precious metals are called bullion when smelted and not perfectly refined, or when refined, but in bars or ingots, or in any form uncoined, as in plate. Crude or base silver bullion, as familiarly known in this territory, and which is mentioned in the agreed statement of facts herein, is silver in bars, mixed to a greater or less extent with base metals. Silver bullion as thus described and known here is property. The agreed statement shows that the appellants are in possession of, and own property of this kind, of the value of $88,112. In this territory bullion is an article of commerce, and its production is one of the leading branches of industry here.

Is this kind of property subject to or exempt from taxation?

Every form of government necessarily provides some system of taxation. This results from the objects and purposes for which governments are instituted and organized, viz., the guaranty and protection of individual rights, and the security and enjoyment of private property. And as all property is alike protected, it follows that the burden imposed as the price of this security should be equally and evenly distributed. Hence results the proposition, that taxation is the rule, and exemption from taxation, the exception. Taxation, however, is controlled by legislative enactments, and its scope and extent is as limited by law. Our legislature has devised a system of revenue laws, and taxation being entirely a creature of statute, to these laws we must look to determine the question involved herein.

Section 3 of our act for the collection of revenue provides (Codified Statutes, 1872, 601): "All property of every kind and nature in this territory, on the first day of January of each year, or which shall arrive or be found in this territory before the last day of December, ensuing, shall be subject to taxation except," etc. * * * Then follow nine certain specific exceptions, such as court-houses, jails, school-houses, public asylums, churches, other charitable institutions and the like, which are designed to exempt certain property from taxation. This section is explicit and certain. It requires no interpretation; its

language is unambiguous and positive, and embraces property of every kind and character not therein specially excepted.

Section 4 provides: "All other property, real or personal, within this territory, is subject to taxation in the manner herein directed, and this is intended to embrace improvements on land," etc., naming several other kinds of property.

Section 15 provides that the tax list shall contain his, her, or their lands, personal property employed in merchandise, etc., and the amount of all other taxable property not enumerated.

Section 16 defines specifically what the tax list shall contain, and requires the person who is being assessed for taxation to answer under oath at the conclusion of the list, the following questions: "Have you any other property than that above mentioned?" "If so, enumerate it."

In construing these sections and others of the revenue act, our purpose must be to ascertain the intention of the legislature. The means of ascertaining this intention are to be found in the statute itself, taken as a whole, with all its parts: Sedgwick on Stat. and Const. Law, 379.

It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute restraining or enlarging the meaning of its general words, they must receive a general construction and the courts can not arbitrarily subtract from or add thereto: *Tynan* v. *Walker*, 35 Cal. 642.

It is assumed by the appellant in the argument that section 3 of the act expresses the general intention of the legislature, and that section 4 limits and controls such intention by specifying particulars. In other words, that section 4, in the specific items of property therein named and described, contains all the kinds of property that under any circumstances are subject to taxation. This assumption is not warranted by the rules of statutory construction. We must gather the general intention of the legislature from an inspection of the whole enactment and every part of it. We can not look exclusively at section 4, and shut our eyes to the other sections. Each section, if possible, should be made to harmonize with every other section, and only when the words are ambiguous and uncertain can resort be had to anything outside the statute itself. If the language is unambiguous it is its own interpreter.

It is further assumed that section 4, when it declares that "All other property, real and personal, within the territory is subject to taxation in the manner herein directed, and that this is intended to embrace improvements on land," etc., naming several different kinds of property, thereby defines in the enumeration of particular property just what is meant by the general words, "all other property, real and personal"—that is to say, that section 4 names certain property as subject to taxation, defining what is embraced in the words "all other property, real and personal," and that all property within the territory not so named is exempt from taxation.

There might be some force in this assumption if section 4 contained the whole enactments. But this section must be construed with reference to each and every other section of the act, and effect must, if possible, be given to each section. The evident intention of the legislature in making an enumeration in section 4 was to subject to taxation certain property that otherwise might have escaped the burden, such as annuities, franchises, ditches, flumes, money, gold dust, etc.

If section 4 in its enumeration of property embraces all property upon which a tax can be levied, then we are forced to the conclusion that the legislature, in the passage of section 4, thereby intended to make void sections 3, 15 and 16, for these sections imperatively require that all property, of every name and nature, shall be listed and valued for taxation, whether such property is enumerated in the statute or not.

Now, an examination of the whole act and its several sections at once produces the conviction that the legislature intended that all property of every kind in the territory should be subject to taxation, saving only such property as is therein specially exempted. Section 3 demands this by declaring that all property of every kind and nature shall be subject to taxation. Section 15, by requiring a list of all property, whether enumerated or not; and section 16, by requiring the person to answer not only as to the property named, but as to all other property he may have. The bare fact that certain property is by the language of the act exempted from taxation, raises a strong presumption that all other property is subjected to taxation, and when that natural presumption is made absolute by the words of the statute, there is left no room to doubt what the legislature intended.

Sections 3, 15 and 16 are in perfect harmony. Section 3 provides that all property of every kind shall be subject to taxation; section 15 requires the assessor to list all property for taxation, whether enumerated or not; and section 16 requires the person who is being assessed to answer, under oath, not only as to the property mentioned in the statute, but as to any and every other kind or species of property he may own. Section 4 is not in conflict with either of these sections. While there are mentioned in section 4 several kinds of property about which there could be no doubt as to its being subject to taxation, the evident object and purpose of the enumeration contained in this section was to cover property which, but for such enumeration, might have escaped taxation, as, for instance, improvements on land made under a mere possessory right, while yet the title remained in the United States, or gold coin, gold dust, bank bills, annuities, etc. But whether the property is enumerated or not—whether it is or is not named in section 4, the absolute requirement of sections 3, 15 and 16 is that it shall be named and valued in the list for taxation. The language of these three sections is much broader, and at the same time more particular and specific, than is the language of section 4, and with better propriety might it be said that these sections make void section 4, than to say with the appellants that section 4 virtually makes them void. The requirement that certain property shall be taxed is not at all in conflict with the requirement that all other property shall be taxed. The enumeration in section 4 does not in the least conflict with the requirements of sections 15 and 16 that the tax lists shall contain, not only the property enumerated, but any and all other property.

A bare inspection of section 4 will refute the proposition contended for by the appellants, that taxation is wholly confined to the very limited and restricted kinds of property therein enumerated. Our revenue act is a general one, evidently designed to subject the property of the territory generally to taxation. We can not hold, unless compelled to do so by the rules of interpretation, that the legislature intended to particularize and name only the different kinds of property that should be taxed. The nature, form and shape of property is constantly changing; new industries are con-

stantly producing new kinds of property; every year by importation, by ingenuity, industry and enterprise, something new, something unknown to the particular nomenclature of the statute is added to the property of the territory, and the language of the statute in its broad and general terms, as well as common sense, forbids an interpretation that limits and restricts taxation to the very few articles originally designated in the act.

The interpretation contended for exempts all merchandise in the territory from taxation. The property known as merchandise is unknown to section 4; section 6 provides how merchandise *in the possession of merchants* shall be listed and valued, but for the requirement that it shall be taxed, when thus listed and valued, we must look to the general words of sections 3, 15 and 16. Section 4 is silent on the subject, but the law-makers having provided for the listing and valuation of merchandise for taxation, we must conclude that they supposed they had provided for such taxation in the sections named. The valuation of merchandise is an idle thing unless it can be taxed, and the provision for its valuation is entirely harmless for all there is in section 4.

Owning property for the purposes of taxation, and the authorizing of a levy thereon, are entirely different things, and by adopting the interpretation asked for, we have a statute providing for the mode and manner of listing and valuing of merchandise for taxation, but no authority to levy a tax thereon. And even this listing and valuing is only required when the merchandise is in the possession of merchants. Now, suppose this kind of property is in the possession of persons other than merchants. According to the argument, such property so owned and possessed is absolutely exempt from taxation. It is not even to be listed or valued. If section 4 controls, then this and a vast amount of other property in the territory escapes taxation.

Take the article of wool, property largely produced in the territory. It is not named in section 4, and it is not merchandise. It is produced by the stock-men and farmers and used or sold where best they can find a market. It is nowhere named in the statute, and therefore according to the notion of appellants is exempt from taxation. And so, beef

in the barrel, hams, bacon and mutton, representing a large industry here, and with which our meat markets are filled, are not named in the statute and therefore are exempt. The article of wood, the production of which engages the attention of a large class of people here, is not mentioned in the statute. And so with lumber, the production of which builds up fortunes; and so with flour, wheat, pork, oats, barley, hay, malt, potatoes, all farm products after being severed from the land; manufactured sash, doors, blinds, steam-engines, boilers and castings. All of these things are produced here and represent a large amount of property, but not being named in section 4 are exempt from taxation according to the theory of appellants. Take the property known as hides and furs—both being produced here in large quantities, representing the wealth and labor of numerous individuals, and yet not being named in section 4, are to escape all taxation. And so with property in copper, lead and coal, each the product of the territory and representing property here. And so we might continue to an almost unlimited extent, to name property in the territory that is unknown to section 4, and which, therefore, according to the proposition of appellants, should escape taxation.

In the light of these facts can we suppose that the legislature, after having declared that all property in the territory should be subject to taxation, intended, by the enactment of section 4, to make taxation the exception, and exemption the rule? The theory of the appellants would compel the adoption of this rule, for it is safe to say that more property in the territory can be named outside of section 4 than is mentioned in that section.

But it is argued that had it been the intention of the legislature to subject bullion to taxation, it would not have been left out of the enumeration of property in section 4, subject to taxation, when money in coin and gold dust are spoken of and embraced in the enumeration. We have already indicated the reason why gold dust and coin were mentioned in the enumeration. But suppose this gold dust is melted and run into bars, as it generally is, as soon as taken from the ground, whereby it becomes bullion, then, according to the position of the appellants, it is to escape taxation; and so, if coin is con-

verted into bullion, it can not be taxed, because bullion is not named in section 4. And so, if A is the owner of a valuable herd of cattle and sells them and converts their value into bullion, wool, wood, lumber or merchandise, he thereby places his property beyond the reach of assessment for taxation. In like manner if any of the property mentioned in section 4 is but converted into property not therein named, and especially into bullion, it becomes at once exempt from taxes. Even if the change of form increases the value of the property, but changes its name, then it is to escape.

These illustrations, it seems to me, demonstrate the fallacy of the appellant's position. The truth is that when our revenue act became a law, the country had not produced property known as silver bullion to any extent. Gold, from placers and leads, was then our chief production in the precious metals, which the legislature was careful to subject to taxation. Since that day an extensive industry has sprung up here in the production of silver bullion, copper and lead, and care seems to have been taken in the enactment of our revenue laws, to make them broad enough to cover every kind and description of property that might be brought into, or produced within, the territory.

It is claimed that one of the exemptions in section 3 forbids the taxation of bullion. The exemption is as follows:

"Ninth—mines and mining claims, except those held under patent from the United States."

A mining claim is a certain defined piece or parcel of ground, and the meaning of this exemption is that while the claimant has merely a possessory title, and before acquiring title from the United States this ground shall not be subject to taxation. That is to say, the mere possessory right of the claimant in the ground itself shall not be taxed. But this exemption does not cover the product of the mine any more than the exemption of growing crops exempts the money for which they are sold.

The legislature could not have intended to subject to taxation the products of patented mines, while those of unpatented mines were exempt, where everything necessary to procure the issuance of a patent had been performed by the claimant.

Suppose a homestead of 160 acres was exempt from taxa-

tion, would it necessarily follow that its products, its horses, cows, sheep, wool, grain and hay were also exempt?

The plaintiff is a corporation whose stock is divided into shares and owned by individuals, and the appellant contends that because these shares of stock are subject to taxation, therefore the products of the property are exempt. Suppose this corporation owned a farm and was engaged in the business of raising sheep for the production of wool and mutton, instead of owning a mine and engaged in the business of producing bullion? In the former case the shares of stock would represent the value of the farm as a farm, while in the latter they would represent the value of the mine as a mine, independent of what labor and skill might make it produce. Even if the taxation of the products of the mine and the shares of stock works a hardship or results in duplicate taxation, the same is not invalid. The law must be enforced until it is repealed.

For these reasons the judgment is affirmed with costs.

Judgment affirmed.

COLUMBIA CONDUIT CO. v. COMMONWEALTH.

(90 Pennsylvania State, 307. Supreme Court, 1879.)

Tax on oil pipe line. A corporation engaged in the removal of petroleum from place to place by means of pipes, is a transportation company within the meaning of the 4th section of the act of April 24, 1874, and the 5th section of the act of March 20, 1877, and is subject to the tax imposed by said acts.

[1] **Losses not deducted.** The act of 1874 requires transportation companies to pay annually a tax "at the rate of nine tenths of one mill upon its capital stock for each one per cent. of dividend made or declared by such company." *Held*, that the amount contributed by the stockholders to pay a loss incurred by the corporation can not be deducted from the amount of this taxable dividend, as made or declared.

Error to the Court of Common Pleas of Dauphin County.

These were two appeals by the Columbia Conduit Company of Pennsylvania from the decision of the Auditor

[1] *Oliver* v. *Cornwall Copper Co.*, 12 Allen, 298.

General and State Treasurer, made in the settlement of the accounts of said company with the Commonwealth. Said officers first assessed a tax on the capital stock of said company for the year ending the first Monday of November, 1876, under section 4 of the act of April 24, 1874, Pamph. L. 70, which provides as follows:

"That every railroad company, canal company, steamboat company, slackwater navigation company, transportation company, street passenger railway company, and every other company now or hereafter incorporated, by or under any law of this Commonwealth, or now or hereafter incorporated by any other State and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation or company, any railroad, canal, slackwater navigation, or street passenger railway or device for the transportation of freight or passengers or in any way engaged in the transportation of freight or passengers, shall be subject to and pay a tax into the treasury of the Commonwealth, annually, at the rate of nine tenths of one mill upon its capital stock for each one per cent. of dividend made or declared by such company, and in case of no dividend being made or declared by such company upon either its common or preferred stock, then six mills upon a true valuation of the capital stock of the same upon which no dividend has been made or declared, made in accordance with the provisions of the third section of this act."

Said officers also imposed a tax on the gross receipts of said company, from March 20, 1877, to June 30, 1877, under the provisions of the act of March 20, 1877, Pamph. L. 5, the 5th section of which provides that the companies mentioned in the act of April 24, 1874. section 4, "shall pay annually * * * a tax of eight tenths of one per centum upon the gross receipts."

The Columbia Conduit Company is a corporation created by the Act of 25th April, 1872, Pamph. L. 1872, p. 1150. Section 3 of that act thus enumerates the objects for which the company was formed and the powers it should possess:

"That the company shall have the right for themselves or as agents, upon commission or otherwise, to purchase, sell or otherwise dispose of oil and oil lands, mine or bore for oil, and

store, insure, ship and transport petroleum, and may construct and erect tanks of iron or other suitable material for the storage of oil, and to lay down, construct and connect iron or other pipes or tubing for that purpose, from any point or points within the county of Butler, to, at or near Sharpsburgh, in the county of Allegheny, by such route or routes as may be for the best interests of the company; and said company shall also have the right to take, use and occupy such lands as may be necessary for the purpose of erecting tanks to hold the oil or petroleum, and for the purpose of laying down the pipes or tubing for the conveyance of the oil from well, wells or reservoirs, and for all necessary branches, and for the erection of such machinery as may be requisite to carry on the transportation and storage business of the company."

The company laid down pipes, through which petroleum was conveyed from point to point.

The cases were tried by PEARSON, P. J., without a jury, who delivered the following opinions therein:

"The facts established in the first of these cases, No. 230, November term, 1877, present two prominent points: first, is the defendant a company on which a tax is imposed by the 4th section of the act of April 24, 1874? and secondly, if taxable, at what amount should that tax be rated?

"The statute after enumerating various other companies, speaks of 'transportation companies' 'and every other company now or hereafter incorporated by or under any law of this Commonwealth' and, after providing for other companies incorporated by other States doing business here, goes on to say, 'or device for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers, shall be subject to and pay a tax into the treasury of the Commonwealth, annually, at the rate of nine tenths of one mill upon its capital stock for each one per cent. of dividend made or declared by such company.' It is conceded in the argument, that the principal, and probably, all of the business of this company is in flowing petroleum or oil from place to place, mentioned in the charter of incorporation, by means of pipes through which the oil or petroleum flows, or is pumped and is thus moved by flowing or pumping, according to the character of the grade from the oil wells to the place of manufact-

ure; and probably, the prepared oil from thence to the points on the railroad for shipment. It is contended that this moving of petroleum by means of pipes is not 'transporting,' and therefore, that this is not a transportation company. The defendant's counsel contends that to transport is to carry, and that this transit company does not carry, but the petroleum flows; we consider this too narrow a construction. If we look into the dictionary for the meaning of the word 'transport,' Webster defines it, 'to carry or convey from one place to another,' again 'to remove from one place to another,' and throughout all of the derivations from the word transport we find the same part of the definition 'to remove,' as transported is, *inter alia*, defined 'removed.' This petroleum is certainly removed. To look into the origin of the word composed of *trans* 'over' 'from one place to another' and *portus* 'moving or carrying' and *portatus*, 'bearing or bringing' is going into too much refinement, but such was the character of the argument. We must construe words not according to their original etymology, but by the common parlance of the country. In the present case we have a much better guide—the words of the charter of the incorporation, the third section of which authorizes the company to transport petroleum, and for that purpose to lay down pipes from the points named, and for the purpose of transportation of petroleum, oil, etc., may lay down pipes or tubing.

"Again, the fourth section gives like authority: to lay down pipes or tubing to supply the refinery with oil. Again, in the act of March 12, 1872, P. L. 23, we find similar language used in regard to the transportation of petroleum in certain counties; they are authorized to lay down pipes, tubing, etc., to transport petroleum. This being the general language used by the legislature in regard to the removal of petroleum from place to place by means of pipes, why shall we not believe that the same was meant when the tax is laid on all transportation companies?

"Again, this 4th section of the act of 1874, in speaking of the companies to be taxed, also says, after enumerating certain kinds of companies, 'or device for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers.' Under this language we can not doubt

that this is a company engaged in the transportation of freight, within the Act of Assembly.

"The second is a question of greater difficulty. In assessing this tax on the capital stock, the State officers have no other data than the report made by the company officers under oath as required by law. The return shows very clearly that between the 15th day of February and the first Monday of November, the sum of $200,000 was received and divided among the stockholders, on a capital of $350,000. All of this was paid over from month to month, during the year 1876, as made. The return shows, however, that during the year the corporation met with losses, which, although they did not reduce the dividends, had to be made up by the stockholders who furnished petroleum from time to time, to cover the evaporation and supply the place of that which was burned, amounting in all to $89,429.58, the net profits of the year being only $110,570.42. Can the court allow a credit for that loss, or under the words of the statute, must we tax the capital stock according to the dividends made or declared by the company?

"If the tax was imposed on the net profits there would be no difficulty. The sum which the stockholders were obliged to pay would be deducted. The profit to them is lessened by that much. Such is not the form of the assessment or the words of the statute. It is not even a tax on dividend, but on "the capital stock measured by the amount of dividend made or declared." The dividends in the present case were not only made and declared, but actually paid over to the stockholders. They preferred receiving their dividends and making up the loss by evaporation or fire by delivering more petroleum, and if they chose to transact their business in that way, it did not lessen the amount of dividends; yet it did of clear profit at the end of the year. The stockholders need not receive their dividends until the end of the year, and can then have the losses paid before the dividend is declared. That course was not pursued here; but on the contrary the dividends were all paid over, and the losses afterward voluntarily made up by contribution of the stockholders. Sometimes dividends are so declared in order to ostensibly increase the value of the stock for the purpose of speculation by sales. Be the object what it

may, the dividends in the case under consideration were actually made and declared, and fixes the tax upon the capital stock. We therefore report against this corporation, and in favor of the Commonwealth, as per report filed with this opinion."

The defendant took these writs and alleged that the court erred in the foregoing decisions.

EUGENE SNYDER and JEREMIAH S. BLACK, for plaintiff in error.

LYMAN D. GILBERT, Deputy Attorney General, and HENRY W. PALMER, Attorney General, for the Commonwealth.

The judgment of the Supreme Court was entered June 2, 1879, PER CURIAM.

We affirm these judgments upon the opinion of the learned president of the court below.

Judgment affirmed.

THE TOWN OF GOLD HILL v. CALEDONIA SILVER MINING CO.

(5 Sawyer, 575. Circuit Court, District of Nevada, 1879.)

Exemption of mines from taxation does not exempt improvements. Article 10 of the Constitution of Nevada, which restricts the power of taxation to the "proceeds alone" of "mines and mining claims," does not forbid the taxation of permanent engines, hoisting works and machinery affixed to the soil, nor yet personal property not affixed to the soil and used in carrying on the work of the mine.

Municipal taxation of property not benefited by municipality. The legislature having power to establish a municipal corporation and to confer upon it the power to levy taxes upon property within its corporate limits, courts will not inquire whether, in the exercise of this power, property is taxed which is not correspondingly benefited by its location within such limits, for the purpose of determining the legality of the tax.

Surface exempt. Surface ground taken up as part of a mining claim is clearly within the words used in the constitution exempting "mines and mining claims" from taxation.

Before SAWYER, Circuit Judge, and HILLYER, District Judge

The agreed statement of facts and the evidence together, show that the plaintiff is a municipal corporation, and the defendant a mining corporation, having a mining claim within the corporate limits; that upon this claim there are hoisting works and machinery affixed to the soil; that there is also personal property about the mine used in working it; that a tax for municipal purposes was levied upon the town lots which embrace the surface of defendant's mining claim, upon the improvements and the personal property. This suit is brought to enforce the payment of the tax so levied.

JOHN HARRIS and LEWIS & DEAL, for plaintiff.

STONE & HILES, for defendant.

By the Court, HILLYER, J.

The defendant resists the payment of the tax levied upon it by the plaintiff on two grounds: Firstly, because the tax is in violation of article ten of the Constitution of the State of Nevada, which restricts the power of taxation to the "proceeds alone" of "mines and mining claims." The defendant contends that this article forbids not only the taxation of the body of the mine itself, but also the permanent engines and machinery affixed to the soil, which, it is said, are included in the words "mines and mining claims." It is also claimed that the tax on the personal property used in carrying on the work of the mine is essentially a tax on the mining claim. Whether or not this objection to the tax is well taken depends upon the true sense the words "mines and mining claims" were intended to have as used in the constitution. So far as the personal property, not fixed to the soil, is concerned, there seems to be no reasonable ground for exempting it from taxation as included either in the term "mine" or "mining claim."

The hoisting works, with its machinery, is much more plausibly claimed to be fairly included in the term "mines and mining claims." But even as to them there are satisfactory reasons showing that the framers of the constitution did not

intend to exempt the hoisting works and machinery, and generally the surface improvements of a mine from taxation. It can not of course be denied that under many circumstances the words mine and mining claim include both the mine proper beneath the surface and the works above on the surface; but here the question is, under all the circumstances, in what sense did the framers of the constitution use these words? No presumptions are to be made in favor of exemptions from taxation; on the contrary, all the presumptions are against them: *Railroad Co.* v. *Gaines*, 7 Otto, 697. If the words to be construed will fairly bear a construction narrower than the one claimed by the defendant, we must presume the legislature or framers of the constitution used them in the more restricted sense, inclining to that construction which will trench as little as possible on the State's power of taxation, a power vital to its existence. In the case of *Platt* v. *Union Pacific R. R.*, 9 Otto, 48, the Supreme Court of the United States lays down a rule of construction which can be applied with profit in this case. "There is," says the court, "always a tendency to construe statutes in the light in which they appear when the construction is given. * * * But in endeavoring to ascertain what the Congress of 1862 intended, we must, so far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

From before the organization of the territory of Nevada down to the adoption of the present constitution this was essentially a country of mines and mining claims, and the exemption of mining property to the extent claimed by the defendant would have made it impracticable, probably, to establish a State government. We find from the beginning a distinction taken and kept up in the revenue laws, between the mine or mining claim and the surface improvements. In 1861 "mining claims" were exempted from taxation, while the machinery and improvements on the claim were taxed: Laws of 1861, p. 146; see also, Laws of 1862, p. 132; Laws of 1864, p. 38. These laws all keep up the distinction between mines and improvements on them, classing the former as real, and the latter as personal, property.

The first constitutional convention, which met in 1863, framed a constitution which provided for the taxation of all property, including in terms "mines and mining property." This was rejected by the people. The present constitution was framed in 1864, and article ten provides for the taxation of all property, "real, personal and possessory, excepting mines and mining claims." The convention of 1864 took the rejected constitution of 1863 as the basis for a new one, and proceeded to alter and amend it, the most important amendment being in article ten. The change is significant. The constitution of 1863 provided for a tax on mines and mining property; that of 1864 excepts "mines and mining claims" from taxation, providing for a tax on the proceeds alone. Why this change of the words "mining property" to "mining claim?" The debates in the convention show quite clearly. It is evident the members had in their minds that distinction between mines and mining property, or improvements, which appears in the previous territorial legislation, and intended by the language used, an exemption of the body of the mining ground only, leaving the proceeds, whenever a mine yielded any, and the mills, hoisting works, engines and other "mining property" still subject to taxation. A few quotations from the debates will make this apparent. Mr. Banks said that "not only in California, but in this constitution, framed by the former convention, which we have adopted as our basis, there has always been a distinction made between mines and mining property. I propose to preserve that distinction. * * * Mining property is considered to embrace all the improvements on mines, and that is included with and taxed as other property is taxed. Mills, hoisting houses and all the other property connected with mining operations, which is distinct from the mine itself, have been taxed as mining property. * * * If the members of the former convention had not clearly recognized that distinction they would not have used the two sets of words but would have said 'mining property' alone or 'mines' alone." Con. Debates, p. 224. And he goes on to show why the mines should not be taxed. This position taken by Mr. Banks is nowhere questioned throughout the discussion of article ten. Wherever any allusion is made to the matter,

it is such as to show that there was no objection on the part of the mining interest to taxation of improvements on mines.

Mr. DeLong, an ardent advocate of the mining interest, at one time said that for the sake of compromising he was willing to abandon the position he had at heart: "That nothing but the proceeds and improvements of mines and not the mines themselves should be taxed," etc. Debates, p. 321. Again he says: "I believe they (the mines) are not such property as should be included in taxation beyond the proceeds and the improvements." Id. p. 322. Again: "We are willing to pay on everything that is in sight, or that we know we have got. You may tax every dollar taken from the mines and every building erected upon them; and when you have gone that far we think you have gone far enough." Id. p. 336; see also, pp. 339, 418.

Throughout the whole discussion of article ten, which was quite general and lasted several days, there does not appear to have been any question raised about the propriety of taxing mills, hoisting works, and all other surface improvements of mines and mining claims. This seems to have been conceded on all sides; it could not justly have been otherwise. There would have been no fairness in exempting from taxation such mining property, having, as it did, a value as easily ascertainable as that of farming property. The contest between the farmers and miner was in reference to taxing the mines considered as a thing distinct from all other property. The miners, with much show of reason, objected to a tax upon the mine, because, until proceeds came out of it, its value was wholly prospective and uncertain. This was the whole extent of the discrimination asked in their favor. They were willing at all times to be taxed on the proceeds and surface improvements of their mines.

Doubtless very great importance should not be attached to individual expressions of members of the convention, but they may be considered in connection with other surrounding circumstances, and may help to make clear the sense of the words "mines and mining claims" as used in the constitution. When, however, it appears that the words were universally understood by the members in a particular

sense, it is difficult to resist the conclusion that the words were used in that sense, although capable of use in another.

The practical construction placed upon article ten, since the adoption of the constitution, has been to preserve the distinction between mining claims and the surface improvements thereon. The first State Legislature, using the words of the constitution, exempted "mines and mining claims" from taxation, and under this law the improvements on such claims have ever since been taxed. The evidence in favor of that construction which distinguishes the mine from the improvements on it, consists in the distinction which existed before the making of the constitution, agreeably to which the mine was not, and the improvements were, taxed; the debates in the convention showing the sense in which the words were generally understood by the members; and, lastly, the practical construction placed upon the words from the time of the first State Legislature until now. Upon this evidence we think the words "mines and mining claims," as used in the constitution, do not include anything more than the body of the mine or claim itself, and that the hoisting works, engines and other surface improvements, are subject, like other property, to taxation.

Secondly: The defendant claims the tax to be illegal because the property taxed, though within the chartered limits of the town, is not within its actual limits; and the defendant, not deriving any benefit from the town government, the tax amounts to a taking of private property for a public use without just compensation.

The testimony shows that the premises taxed have been surveyed into blocks and town lots, and so designated on the town map; that the town had built no roads to defendant's works; that no aid, or aid of a very doubtful kind, could be given in case of fire by the town fire department; and in the opinion of most of the witnesses, the defendant derived no benefit from being included in the town limits. The defendant does not question the power of the legislature to establish public corporations for public and municipal purposes, and define their limits; nor to confer on them power to tax property within the corporate limits in general; nor is the town ordinance, passed in pursuance of the charter of the

town of Gold Hill, attacked as an illegal exercise of the town's power to tax as a whole. The argument is, that it is proper to inquire whether the defendant is or is not benefited by the town government; and if not, the tax, so far as concerns the defendant, is illegal, as a taking of private property without compensation. Cases from Kentucky, Iowa and Nebraska are cited in support of this argument. In Kentucky, where one having thirty-one acres of agricultural or horticultural land, objected to paying a city tax, it was held that where the object was to give the border population a "local government and the benefit of police regulations" the tax was valid. The court said, however, that it would have been otherwise if the object had been to tax the property merely in order to increase the city revenues and lessen the burdens of others: *Arbegust* v. *Louisville*, 2 Bush, 271; *Swift* v. *Newport*, 7 Id. 37.

The case of *Bradshaw* v. *Omaha*, 1 Neb. 16, arose on a demurrer to the complaint. The allegations, which must have been admitted by the demurrer, was that the plaintiff's land was two miles from the settled part of the city, and one mile from any town lots settled or occupied as such; that the act extending the city boundaries "was passed for the sole purpose of subjecting the lands to the burdens of city taxation and to reduce the taxation on property previously within its limits." It was held that the act extending the city limits to embrace these agricultural lands was unconstitutional and void, as taking private property without compensation. The charter limits of the plaintiff are the same now as when first established in 1862. So in Iowa it has been held that lands, within the corporate limits, used exclusively for agricultural purposes, and not benefited by the current expenditures, are not subject to city taxation. The circumstances show, says the court, that the lands of the plaintiff are sought to be brought within the jurisdiction of the city, solely for the purpose of increasing its revenue, thereby taxing these lands for the benefit of others owning property in the city: *Deiman* v. *Fort Madison*, 30 Iowa, 542.

To bring the present case within the principle of these decisions, it will be necessary to find that the legislature of 1852 included the defendant's property within the town boundaries solely for the purpose of increasing the town's revenue, there-

by to lessen the burdens of those who inhabited the more settled parts of the town, and not intending to establish a local government for the benefit of all. Unless the fact, if it be a fact, that the defendant is not now benefited by the town proves this, it has not been done.

In Georgia the taxation of agricultural lands within corporate limits, is held to be a question for the legislature and not for the courts; that when the law-making power, acting within the scope of its delegated authority, has seen fit to tax such lands, the courts can not interfere; they can only execute and enforce the law, not make a new one: *Linton* v. *Mayor of Athens*, 53 Geo. 588. Cooley says of the Kentucky, Iowa and Nebraska decisions, that it seems difficult to harmonize them with the conceded principles governing the laws of taxation. "For, 1. They do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public, but they leave the legislation to stand, and only qualify its effects on the ground that it has been adopted on improper grounds and will operate unequally. 2. This is done on an inquiry into the facts, and a substitution of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too—the proper limits of city extension—upon which persons are certain to differ widely." Cooley on Taxation, 120.

The only restrictions on the power of the State of Nevada to tax property within its jurisdiction, and direct the purposes for which taxes shall be raised, are that the assessment shall be uniform and equal and the purpose a public one; with this qualification the extent of taxation is a question for the legislature—it may be carried as far as that body chooses to carry it. The only protection against abuse lies in the fact that the taxpayers are the constituents of those who levy the tax: *Gibson* v. *Mason*, 5 Nev. 283, 306. So long as the legislature acts within these conceded powers the courts may not interfere. "The judicial can not prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." *Veazie Bank* v. *Fenno*, 8 Wall. 533.

The town of Gold Hill is a public corporation created by the legislature for political purposes. It has conferred upon it, by the legislature, a power of taxation. This power extends to all property, real and personal, within the town, "made taxable by the laws of this State for State and county purposes." Given, then, the power of the legislature to establish a municipal corporation and to confer upon it a portion of the legislative power of the State, I can not see any ground upon which the court can interpose to defeat the legislative will in this case, that will not justify it in substituting its own opinion as to the justice, policy and expediency of any other law conceded to be within the power of the legislature to enact.

It might not be difficult to distinguish this case from those cited by defendant in some important features. For instance, the property here has been laid off into blocks and lots, and these are numbered on the town map, tending to show that the property is needed for town purposes. The works are within fifteen hundred feet of a fire-plug, and it would be quite possible to lay down that much hose in case of fire. The defendant, too, may be regarded as receiving benefit from the schools, to the support of which a part of the tax is devoted, and from the good order secured by the incorporation of the inhabitants into a town. But it seems to me altogether improper for a court to make inquiry in regard to the benefit the citizen receives from a tax; or into the motive of the legislature in levying the tax; or into the propriety of that body exercising a conceded power in a given way. Such inquiries are very fit for the legislator and very unfit for the judge.

But one point remains. It is admitted that lot 39 and the south two hundred and ten feet of lot 20 are a portion of the surface ground of the defendant's mining claim. The surface ground taken up as part of a mining claim is clearly included in the words "mines and mining claims" as used in the constitution; and while the improvements erected thereon may be taxed, such surface ground can not. There must be judgment in favor of plaintiff as prayed, less the tax levied on this surface ground, which is twelve dollars and a half.

THE STATE OF NEVADA, Respondent, v. THE NORTHERN BELLE MINE AND MINING CO., Appellant.

(15 Nevada, 385. Supreme Court, 1880.)

Special demurrer. A discrepancy in figures in a complaint stating a good cause of action will not be reached by general demurrer.

Delinquent list. The failure to enter the tax on the delinquent list before the commencement of the action is not essential to a recovery.

Second assessment. Where the assessor has made an irregular and void assessment this does not invalidate a second assessment made in conformity with the law.

Time of assessment. The statute prescribing the time for making assessment on ore-proceeds is directory merely; any irregularity in that respect is a defense only to the extent that the taxpayer has been injured thereby.

[1] **Exemptions under Nevada statute.** A company working ores on the Freiberg process is not entitled to an exemption of $15 per ton in addition to the actual cost of reduction.

Appeal from the District Court of the Eighth Judicial District.

The facts appear in the opinion.

GARBER & THORNTON, for appellant.

M. A. MURPHY, Attorney-General, for respondent.

By the Court, BEATTY, C. J.

This is a suit for delinquent taxes. Plaintiff had judgment. Defendant appeals. There was a motion for a new trial in the district court, but the appeal being from the judgment alone, we cannot consider any of the questions argued by counsel touching the sufficiency of the evidence to sustain the findings. Aside from these questions there are but two assignments of error to be noticed.

[1] *State* v. *Eureka Co.*, *ante* —, and *State* v. *Northern Belle Co.*, 13 Nev. 250, followed.

1. It was not error to overrule the demurrer to the complaint. The demurrer was general—that the complaint did not state facts sufficient to constitute a cause of action—but the only fault pointed out in the complaint is an ambiguity. The amount of tax alleged to have been levied and to have become delinquent was only a little over three thousand dollars, when, according to the assessed value of the property it should have been upward of five thousand dollars. This may have been ground for special demurrer, but there can be no doubt that the complaint stated a good cause of action for the amount demanded and recovered, and the general demurrer was properly overruled.

2. The court refused to permit the defendant to introduce evidence tending to show that the tax sued for had not been entered on the delinquent list before the action was commenced.

The delinquent list offered in evidence was in due form, and purported to have been made at the proper time, which was long before the commencement of this suit. Such being the case, it is very doubtful whether parol evidence, tending to falsify the officer's return, would have been admissible, even if it had been material under the pleadings: Cooley on Taxation, 195, 196. But aside from this question, it is clear that in this case the evidence offered was immaterial. It is settled in this State that the existence of a delinquent list is not essential to the right of action for taxes that ought to have been returned delinquent: 4 Nev. 338; 10 Id. 78. It may affect the right of the district attorney to prosecute the suit, but if so, his want of authority is the ground of a preliminary motion to dismiss the action—not of defense to the merits: 10 Nev. 78.

The testimony, then, which was excluded by the court, if offered for the purpose of securing a dismissal of the action, on the ground that it was commenced without authority, came too late when the case was on trial, and if offered to sustain any issue made by the pleadings, it was immaterial.

There was no issue of fact as to the regularity of the assessment, or the non-payment of the tax sued for. The answer did, it is true, deny, on information and belief, that there was any assessment; but its positive averments in regard to the

matters relied on as a defense to the action, were wholly inconsistent with this qualified denial. What clearly appears from the allegations of the answer is, that the assessor, having first made an irregular and insufficient assessment, afterward made one in conformity to law, and the question presented is, whether such second assessment was valid. If it was, and if the action of the board of equalization in attempting to reduce it was void, as the court found it was, then there was no question as to the right of the State to recover.

We think the second assessment was valid on the facts stated in the answer.

The first assessment failed to show the cost of extracting, transporting and reducing the ore, and afforded no means of ascertaining the net proceeds. The second assessment was according to the form prescribed by the statute: Comp. L. 3246.

It stated the whole number of tons, the gross yield, the actual cost of extraction, transportation and reduction, and the resulting net yield or taxable value. This exceeded the first valuation by a sum equal to fifteen dollars per ton on the whole amount of ore reduced, thus proving by the facts which the assessor is required to ascertain and set down on the assessment roll, that his former valuation was the result of an erroneous construction of the provision relating to ores worked by the Freiberg process: Comp. L. 3245.

We see no reason why the second and regular assessment should be deemed invalid on account of the first and irregular assessment for the same quarter. They were not at all inconsistent as to the facts which an assessment should show. Taking them both together, the true assessable value of the ores was plainly evident, and the only discrepancy they exhibited was fully explained. We think the assessor not only had the power, but it was his imperative duty to make an assessment, showing the facts which the law requires him to set down, notwithstanding a previous irregular assessment which failed to exhibit the facts. If it be claimed that the answer showed the second assessment to have been made after the time prescribed by the statute, this objection is fairly met in the opinion of the district judge. The provision as to the time for completing the assessment roll is merely directory,

and any irregularity in that respect is a defense in an action for the taxes only to the extent that the taxpayer has been injured thereby: *Hart* v. *Plum*, 14 Cal. 155; 4 Nev. 338. In this case it is clear that there was no injury. The second assessment was correct, and the defendant had an opportunity, of which it availed itself, to appeal to the board of equalization. That body attempted to reduce the assessment back to its original amount by again deducting fifteen dollars per ton from the ascertained net value. The district court finds that this attempt by the board was wholly void, and we would be bound to presume that the finding was sustained by the evidence, even if the allegations of the answer, with the annexed exhibits, did not show of themselves that what the board of equalization undertook to do was, not to correct valuations, but to exempt from taxation property which, under the law and the constitution, could not be exempted: 8 Nev. 22, 24; 13 Id. 250.

Our conclusion is that, under the pleadings, the delinquent list was immaterial, and evidence to impeach it equally so. The district court, therefore, did not err in excluding such evidence, and its judgment is affirmed.

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[1] STANLEY V. THE LITTLE PITTSBURG MINING COMPANY.

(6 Colorado, 415. Supreme Court, 1882.)

No tax on proceeds directed by statute. There is no provision, constitutional or statutory, which in terms requires the levy of a tax upon the annual net proceeds of mines and mining claims, bearing precious metals.

Property owned at date of assessment. As a rule the statute does not require that a corporation or an individual shall be liable to taxation for personal property owned at any time during the fiscal year, but only upon what was owned on the 1st day of May.

Taxation a matter for the legislative department. It is a fundamental rule that it belongs to the legislative department to determine the person and objects to be taxed and to provide the necessary mode and provisions to make the law effective; also that great caution is to be exer-

[1] The opinion of HELM, who was district judge at the time. upon the demurrer, is found in *Little Pittsburg Co.* v. *Stanley*, 2 Colorado Law Reporter, 81. As to mine tax in Colorado, see 9 Colo. 622; 635, construing proposed bills.

cised in construing a law imposing taxation, in order to arrive at the intention of the law-giver, for it is the intention that it is to be enforced.

When the object is plain and the language unequivocal, effect must be given to the law by the courts, but burdens are never to be imposed upon citizens upon vague or doubtful interpretations.

The annual amount of the net proceeds of mines is not liable, under the statute, to taxation as such.

Error to District Court of Lake County.

The case is stated in the opinion.

G. G. WHITE and L. B. WHEAT, for plaintiff in error.

CHARLES S. THOMAS, CLINTON REED and SAM. P. ROSE, for defendant in error.

BECK, C. J.

The principal question presented by this record is whether, under the revenue laws of this State, a direct tax can be imposed upon the annual net proceeds of mines.

This question is fairly raised by the demurrer to the answer, and while the answer is defective in form, as decided by the court below, it will only be necessary to consider the above question, since it must be decisive of the case. Section 3, article 10, of the Constitution, provides that "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal; provided, that mines and mining claims bearing gold, silver and other precious metals (except the net proceeds and surface improvements thereof,) shall be exempt from taxation for the period of ten years from the date of the adoption of this constitution, and thereafter may be taxed as provided by law."

The authority of the legislature, under the constitution, to impose a tax upon the annual net proceeds of mines and mining claims bearing precious metals, and to make provision for the assessment and collection thereof, is not questioned. That

the legislature has imposed such a tax is not only questioned but denied.

Counsel for the defendant in error insist that the legislature has taken no action on the subject; that the constitutional provision is not self-enforcing, and that the attempt to impose such tax is therefore without authority of law. This was likewise the view taken by the judge who tried the cause below. The only reference to the subject of taxing the net proceeds of mines, made in any act of the legislature since the adoption of the constitution, which has become a law, appears in the act approved March 20, 1877, General Laws, page 742. Section 5 of this act provides as follows: "The following classes of property shall be exempt from taxation, to wit: First, mines and mining claims bearing gold, silver and other precious metals (except the net proceeds and surface improvements thereof), for the period of ten years from the first day of July, A. D. 1876; Second, ditches, canals and flumes," etc.

This section merely excepts the net proceeds of mines from the several classes of exemptions specified therein. It reiterates the permissive language of the constitution in respect to the taxation of such net proceeds, but contains no mandatory provision on the subject. There is, therefore, no provision, constitutional or statutory, which in terms requires the levy of the tax complained of.

But it is contended, in behalf of plaintiff in error, that the provisions of section 4 of the Revenue Act are broad enough to include the net proceeds of mines, and that sections 4 and 5 authorize and require their taxation.

The former section provides that "all property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation."

Section 3 defines the term "personal property" to include everything which is the subject of ownership not included in the term real estate. Conceding that all minerals upon being severed from the earth become personal property, also that the money realized by the sales of minerals comes under the same designation, it is a grave question whether there is not still lacking the requisite legislative authority to sustain the additional assessment in the case before us.

The complaint alleges that there was not, on the first day of

May, 1880, any personal property of the mining company in Lake county, other than that returned by its superintendent to the assessor. If this allegation be true, it satisfies the requirements of the revenue act; for section 9 provides that "all personal property shall be listed in the county where it shall be on the first day of May of the then current year."

There is a further provision that if such property is not returned to the assessor by the owner thereof, it shall be listed and assessed where it may be found at the time of the assessment.

We do not understand it to be claimed that the property upon which was imposed the additional assessment of $1,500,000 was in Lake county, either on the first day of May or at the time of the assessment.

The principal defense set up in the answer to the complaint was that the net proceeds of the mines for the year ending May 1, 1880, were more than $1,500,000, and that the mining company was liable to taxation in Lake county for that year, on and because of such proceeds, in a sum greater than $1,500,000.

The statute does not require that either a corporation or an individual shall be liable to taxation for all the personal property owned by such individual or corporation at any time during the fiscal year, but only upon what was so owned on the first day of May. This is the rule. The following are exceptions thereto, viz.: insurance companies are required to be taxed upon the amount of premiums taken by them during the year previous to the listing; merchants are to be assessed upon the average value of merchandise owned during the year, and manufacturers upon the average value of property purchased or held for manufacturing during the year.

Unless a similar rule can be applied to the mines and mining corporations, so as to require them to return the annual net proceeds of their mines for taxation, but little revenue will be derived from this species of property.

As said by the judge who decided the case below, "The proceeds of a mine are accruing from day to day during the year. From time to time, if there be an excess after deducting expenses, that excess is paid over to the owners, or to the stockholders as dividends; the net proceeds, if the mine

be fortunate enough to have any, are almost always disbursed and distributed as rapidly as they accrue, so that on the first day of May, or on any other given day, the net proceeds in a particular county would be but a small fraction of the aggregate net proceeds for the year previous." 2 Colo. L. R. 86.

Are the courts authorized by the present statute to enforce such a rule?

That it belongs to the legislative department to determine the persons and objects to be taxed, subject to constitutional limitations, and to provide the necessary mode and provisions for making the law effective, is a fundamental principle of law.

It is equally fundamental that great caution is to be exercised in construing a law imposing taxation, in order to arrive at the intention of the lawgiver, for it is the intention that is to be enforced. Cooley's Const. Lim. 514, 515; Cooley on Taxation, 198. The inquiry, then, in the present case, is not whether it be possible to tax the annual proceeds of mines in this State under existing laws, but whether it was the legislative intention in the passage thereof that they should be taxed.

Where the object is plain and the language unequivocal, effect must be given to the law by the courts, but burdens are never to be imposed upon citizens upon vague or doubtful interpretations. It has been well said that "the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed." Cooley on Taxation, 201–203.

Six years have elapsed since the passage of the revenue act under which the assessment complained of was made, and although there are many counties in the State wherein mining is the chief industry, yet it is believed that the present case, with a few others, all occurring in Lake county and in the same year, furnish the only instances of attempts to apply the provisions of the act to the annual net proceeds of mines. The fact that such proceeds were not being taxed was, of course, known to the members of the several legislative assemblies that have convened since the enactment of the law in 1877, but until the session of the present year no positive enactment has been made requiring them to be assessed for

taxation, or providing a system for ascertaining the amount realized by individuals and corporations from such proceeds during the year. The act last mentioned having been vetoed by the executive, for reasons assigned by him, has failed to become a law.

In view of the principles and facts stated, of the obscurity of the statute, coupled with the consideration that, if the intent of the law be as contended for by the plaintiff in error, no system of procedure or machinery has been provided to render it effective, our conclusion is that the annual amount of net proceeds of the mines are not liable, under the statute, to taxation as such.

We discover no error in the rulings of the court below, and its judgment will be affirmed.

Affirmed.

Mr. Justice HELM did not sit in this case.

1. Computation of profits for assessment of income tax from mine: *Coltness Co.* v. *Black*, L. R., 6 App. Ca. 315.

2. When a mine is sold for a consideration payable in half yearly installments (through a period of thirty years) such installments are not annuities, annual profits or gains, or annual payments of a personal obligation, and therefore not subject to income tax: *Foley* v. *Fletcher*, 4 M. R. 130.

3. Mining company subject to taxation where its works are situate or the greater part of its operations conducted: *Garrett Co.* v. *Franklin Coal Co.*, 45 Md. 470. Superintendent should furnish list; company bound by his return: *Lake County* v. *Sulphur Bank Co.*, 66 Cal. 17.

4. A stamp duty imposed by the legislature of California upon bills of lading for bullion transported from that State is a tax on exports and unconstitutional: *Almy* v. *State*, 24 How. 169; *Brumagim* v. *Tilinghast*, 18 Cal. 266.

5. For construction of Pennsylvania statute imposing tax on dividends of coal companies and also a tax on the true valuation of such companies' capital stock, see *Ebervale Coal Co.* v. *Com.*, 91 Pa. St. 47.

6. A law offering a bounty upon the production of salt and exempting the saline from taxation, does not constitute a contract in such sense that it can not be repealed: *East Saginaw Co.* v. *East Saginaw*, 13 Wall. 373.

7. A law exempting mining claims from taxation does not exempt a flume leading to the claim and used in connection therewith: *Hart* v. *Plum*, 14 Cal. 148.

8. In determining the value of lands by statute of Wisconsin, assessors are to consider the "mines, minerals, quarries or other valuable deposits" known to exist therein. *Hersey* v. *Barron Co.*, 37 Wisc. 79.

9. A void tax deed can not be made valid by proof of a valid assessment: *Hearst* v. *Egglestone*, 55 Cal. 365.

10. Taxation of sums agreed to be paid upon failure to mine a given quantity of coal: *Hall* v. *County of Luzerne*, 93 Pa. St. 502.

11. The statute taxing coal companies on their franchises according to the amount of coal mined, is constitutional: *Kittanning Coal Co.* v. *Com.*, 79 Pa. St. 100.

12. The increase of the capital of a corporation out of its profits is liable to taxation as dividends though not formally divided among the stockholders: *Lehigh Crane Iron Co.* v. *Com.*, 55 Pa. St. 448.

13. The words "manufacturers of metals" in a United States statute reducing duties, construed: *Meyer* v. *Arthur*, 91 U. S. 570.

14. When a foreign miner subject to a license tax, was employed by one of a partnership to work in the mines which were the partnership property: *Held*, that the employer and not the partnership was liable for the tax: *Meyer* v. *Larkin*, 3 Cal. 403.

15. Mining corporation held liable to taxation for the excess in value of its capital stock, over its real estate, machinery and other taxable property: *Com.* v. *Hamilton M. Co.*, 12 Allen, 298.

16. Real estate is to be valued as of the first day of June in each year, and mineral raised from the land before that day becomes, and may be taxed as personal property: *Palmer* v. *Cornith*, 3 Pinney, 268.

17. The State of California has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines in the State: *People* v. *Naglee*, 1 Cal. 232.

18. A private citizen may move for and prosecute a writ of mandamus to enforce the duty of collecting taxes upon public officials: *State* v. *Gracey*, 11 Nev. 223.

19. Sufficient description of mine for purpose of assessment: *State* v. *Real del Monte Co.*, 4 M. R. 334.

20. The Statute of Limitations applies to suits brought by the State for the collection of delinquent taxes: *State* v. *Yellow Jacket Co.*, 14 Nev. 220.

21. A coal company having mines in another State is not liable to taxation upon coal temporarily detained in New Jersey: *State* v. *Carrigan*, 39 N. J. L. 35.

22. Assessment against the Sulphur Q. M. Co., not good when the real name was The Sulphur Bank Quicksilver Mining Company: *Lake County* v. *Sulphur Co.*, 66 Cal. 17; see *S. C.* 68 Id. 14.

23. Double taxation (on stock and corporation) considered: *San Francisco* v. *Mackay*, 3 West C. R. 697; *San Francisco* v. *Fry*, 68 Cal. 470.

24. The assessment of mining stock, as such, without further description, is sufficiently definite: *San Francisco* v. *Flood*, 64 Cal. 504.

25. Iron ore is dutiable as a "mineral substance in a crude state." The word "mineral" meaning in such case, the product of a mine: *Marvel* v. *Merritt*, 116 U. S. 11.

COLEMAN'S APPEAL. GRUBB'S APPEAL.

(62 Pennsylvania State, 252, B. & W. L. C. 275. Supreme Court, 1869.)

[1] **Title to Cornwall ore banks.** Coleman and Grubb owned together large quantities of real estate, including the Cornwall ore banks. They selected men to part and allot the real estate, agreeing that the Cornwall ore banks should remain together and undivided as a tenancy in common, because of the impossibility of ascertaining the extent and limits of the ore, and because partition could not be made without great injustice to some of the parties. In amicable actions to carry out the partition, the court adjudged that the "ore banks, etc., do still remain undivided, to be held by (the parties) as tenants in common, according to their respective shares." *Held*, that the parties and their successors were tenants in common of the ore banks.

Evidence aliunde upon plea of res adjudicata. Whenever a judgment in a former case is relied on as conclusive in another, it may be shown by evidence *aliunde*, not inconsistent with the record, that the particular point was not adjudicated, if in law judgment could have been rendered on any other.

The plea of judgment recovered is mixed of matter of record with matter of fact. Although it appear by extrinsic evidence that the matter was within the issue in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration, it will not be conclusive.

Plea of non tenent insimul. Under the plea of *non tenent insimul*, it may be shown that the parties had barred themselves by covenant from partition. Such plea is the general issue, and means that the parties do not hold together so as to be entitled to partition.

Agreement barring partition. The agreement that the Cornwall ore banks should remain undivided established a permanent tenancy in common, and partition could not be had without violating the covenant, which ran with the land.

Division of profits by several workings. The agreement provided that neither of the parties should interfere or interrupt the others at any mine holes by them opened and occupied for the purpose of raising ore: *Held*, that this was not a mode of providing for the enjoyment in severalty of the shares of the parties.

Idem. This provision meant that the parties should be undisturbed in their rights as tenants in common to take and use their respective proportions of ore: and was a grant to open and occupy other mine holes.

Partition implies title in severalty. In every partition there must be a severance so that each tenant shall enjoy his purpart in severalty.

An incorporeal easement is extinguished by unity of title and possession.

A thing corporeal can not be appended to a thing corporeal.

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[1] See note, 3 M. R. 434.

Right of way appurtenant. A right of way can not be used by the owner of the dominant tenement to land other than that to which it is appurtenant.

Usufruct. As to *fructus industriales*, a tenant in common does not receive more than his share, within the statute of Anne, if he merely has the sole enjoyment of the property, though by the employment of his own industry and capital he makes a profit by the enjoyment and takes the whole of it.

Open mines. It is not waste in a tenant for life or years to work mines or quarries already opened.

[1] **Ore leave, as basis of damages.** A tenant of ore mines had under his title no means of obtaining his own share other than by taking at the same time the shares of his fellows. *Held*, that the value of the ore in place, ore-leave, was the just basis of account in this case.

Appeals from the decree of the Court of Common Pleas of Lebanon County.

The case commenced by a bill filed June 7, 1857, by Robert W. Coleman against William Coleman, Robert Coleman, G. Dawson Coleman, Edward B. Grubb and Clement B. Grubb for an account of ore taken by the parties from the Cornwall ore banks in Lebanon county.

After the commencement of the proceedings both Robert W. Coleman and William Coleman died, and administration of their estates, respectively, was granted to A. Wilhelm and Jacob Weidle; Edward B. Grubb has also died, and administration of his estate has been granted to E. Burd Grubb.

The court (PEARSON, P. J.), after argument on bill and answers, decreed, January 6, 1859:

"That a full and true account be taken, between the parties above stated, of all ores taken or sold by them, or any of them, from the Cornwall ore banks and mine hills, of which they are tenants in common in the proportions stated in the bill; and it is further ordered that it be referred to John W. Ulrich, Esq., a master in chancery, to take and state an account between the said William Coleman, Robert Coleman, G. Dawson Coleman, Edward B. Grubb, Clement B. Grubb and Robert W. Coleman, touching the several matters of account in said bill and answers mentioned. That in taking said account the said master commence with the 1st day of April, 1848, and charge each of said parties with all ore taken, used or sold from their

[1] *Grubb's App.*, 3 M. R. 416.

common property described in said bill and several answers; and for the purpose of stating said account the said Robert W. Coleman and William Coleman be taken as one party, owning together fifty ninety-sixth parts, and no account to be stated between them; that Robert Coleman and George Dawson Coleman be taken as one party, owning together thirty ninety-sixth parts, and that no account be taken between them; and that Edward B. Grubb and Clement B. Grubb be taken as one party, owning sixteen ninety-sixth parts, and that no account be taken between them; but that each of said parties, divided as aforesaid, account to the other according to their respective portions in the common property as aforesaid. That in taking said account between the said Robert W. Coleman and William Coleman on the one part, and Robert Coleman and George Dawson Coleman on the other part, between the 1st day of April, 1848, and the 1st day of April, 1853, the master be governed and guided by the terms and conditions of the article of agreement entered into between the parties on the 13th day of March, 1849, and so far as the account has been stated and settled between the parties under that article he is not to travel into the same; and from and after the expiration of the article, each of the parties is to be charged with the ore taken, used or sold by them respectively, according to its actual market value at the time of taking, using or selling the same. That in taking the account between the said Edward B. and Clement B. Grubb, and the said Robert W., William, Robert and George Dawson Coleman, the respective parties be all charged with the quantity of ores taken, used and sold by them respectively, according to its actual market value at the time of so taking, using, selling or otherwise disposing of the same; and in stating that portion of the account, the said Colemans are to be charged with all iron ore taken or used by Robinson & Brooke, or either of them, under the reservation contained in the deed from Peter Grubb and wife to Robert Coleman the elder, 'of sufficient ore for the supply of one furnace,' said ore to be charged to them in the proportion of their respective interest in the ore banks, and at the actual market value at the time of taking the same. And for the better discovery of all the matters aforesaid, the said parties are to produce before the said master, upon oath, all books, papers," etc. * * *

The master, Mr. Ulrich, reported November 1, 1861; and on a number of exceptions filed by all the parties, the court, February 10, 1862, made the following order:

"The report is referred back to the master on the three points named, to wit: The value of the ore from 1848 to 1853, as between the Messrs. Colemans and Grubbs; the difference in the relative quality and value of the ore mined, sold and used by Messrs. R. W. and W. Coleman, and George D. and R. Coleman, from the 1st of April, 1853, to the 1st of January, 1859, and the difference in the expense of mining between the same periods. And in regard to each of these points the parties are at liberty to introduce new or additional evidence if they see proper. We would further add, that if any of the parties consider themselves seriously aggrieved by the alleged error in the original decree, requiring the accounts to be taken jointly between the respective brothers, instead of separately against each, they must present their application for an amendment of the decree in proper legal form, prior to going before the master under the present order.

"The other exceptions are disregarded or overruled."

April 22, 1862, G. Dawson Coleman petitioned the court for a modification of the decree of January 6, 1859.

On the 3d of June, 1862, the court modified the decree as follows:

"All ores taken, used or sold by Robert Coleman and George Dawson Coleman, jointly or on their joint account, from the Cornwall ore banks and mine hills, between the 1st day of April, 1853, and the time fixed by the master for closing the account, shall be charged against them jointly, computing the shares of the two at thirty ninety-sixth parts of the whole; and where ore was taken, used or sold by them severally, the same shall be charged to them severally, computing each to be the owner of fifteen ninety-sixth parts of the premises. And all ore taken, used or sold by Edward B. Grubb and Clement B. Grubb, jointly or on their joint accounts, from the said Cornwall ore banks and mine hills, as described in the plaintiff's bill, between the 1st day of April, 1848, and the time fixed by the master for closing the account, shall be charged to them jointly, computing the shares of the two at sixteen ninety-

sixth parts of said ore banks; and where ore was taken, used or sold by them severally, the same shall be charged to them severally, computing the shares of each at eight ninety-sixth parts of said ore banks. And in all cases where it can not be ascertained from the accounts kept, or other evidence, whether the said ores taken, used or sold by the said Robert Coleman and George Dawson Coleman, were taken by them jointly or severally, the same shall be treated and charged by the master as done jointly, and the same rule shall be adopted in taking the account against the said Edward B. and Clement B. Grubb."

Mr. Ulrich having died, John H. Briggs, Esq., was, on the 4th of September, 1865, appointed master. The master declined to state any separate accounts between the parties. He reported that the ore taken by the parties respectively, should be charged to them at its value on the bank after it was mined, less the cost of mining.

He charged interest from the 1st of January, 1859, the time which he fixed for closing the account, until January 1, 1868, when the account was prepared for presenting to the court, and reported as the result:

That R. & G. D. Coleman have received (including the interest as therein calculated) an excess above their proportionate share in the total value	$185,882.80
Which they owe to the other tenants in common, as follows, viz.:	
To the estate of R. W. & W. Coleman, . .	$146,957.59
To the estate of E. B. Grubb and to Clement B. Grubb, ...	38,925.21
Total, ...	$185,882.80
Also, that the estate of E. B. Grubb and Clement B. Grubb owe to the estates of R. W. & Wm. Coleman, as per the accounts, . . .	$24,766.69

The several parties respectively excepted to the master's report, and after hearing on these exceptions, the court, July 6, 1868, decreed finally as follows:

"That all the exceptions to the report of the master be overruled; that the said report be approved and confirmed, and

that the several parties against whom, by the said report, balances and sums of money have been found due and owing, be ordered, adjudged and decreed to pay the same to the several and respective parties in whose favor respectively such balances and sums of money have been due and owing as aforesaid, viz.: That the said Robert and George Dawson Coleman be ordered, adjudged and decreed to pay to Jacob Weidle and Artemus Wilhelm, administrators *de bonis non* of Robert W. Coleman, deceased, and of William Coleman, deceased, the sum of $146,957.59, with interest from the first day of January last, being for the account of ore taken from the common property described in said bill of complaint, from the 1st day of April, 1853, to December 31, 1858.

"And that the said E. Burd Grubb, administrator of Edward B. Grubb, deceased, and Clement B. Grubb, be ordered, adjudged and decreed to pay to the said Jacob Weidle and Artemus Wilhelm, administrators *de bonis non* of said Robert W. Coleman, deceased, and of William Coleman, deceased, the sum of $24,766.69, with interest from the 1st day of January last, being for account of ore taken from the common property described in said bill of complaint, from the 1st day of April, 1848, to December, 1858.

"And also that the said Robert and George Dawson Coleman be ordered, adjudged and decreed to pay to E. Burd Grubb, administrator of Edward B. Grubb, deceased, and to Clement B. Grubb, the sum of $38,925.21, with interest from the 1st day of January last, being for account of ore taken from the common property described in said bill of complaint, from the first day of April, 1848, to December 31, 1858.

"And it is further ordered and directed, that the payment by the said Robert Coleman and George Dawson Coleman, or either of them, of the several sums ordered, adjudged and decreed to be paid by them as aforesaid, shall in no wise affect, preclude or determine the rights and proportions of interest of said Robert Coleman and George Dawson Coleman, as between themselves, but that their respective rights, interests and liabilities as between themselves as aforesaid, shall be and remain according to their several and respective interests in or on account of the common property, and according to any contract relations existing between them.

"And the release and discharge of the said administrators of the estate of Robert W. Coleman, deceased, and also of William Coleman, deceased, respectively, shall forever exonerate the said Robert Coleman and the said George Dawson Coleman, and also the estate of Edward B. Grubb, deceased, and the said Clement B. Grubb, from all future demand and liability on account of any money ordered to be paid by them or either of them under this decree. The amount so paid to the said administrators to be adjusted between the said estates of Robert W. Coleman, deceased, and William Coleman, deceased, according to the interest of the respective decedents therein.

"And the release and discharge of the administrator of Edward B. Grubb, deceased, as also of Clement B. Grubb, respectively, shall forever exonerate the said Robert Coleman and the said George Dawson Coleman from all future demands and liability on account of any money ordered to be paid by them under this decree. The amount so paid to the said administrator, and to the said Clement B. Grubb, to be adjusted between them according to the interest of the respective parties therein; and that the costs be paid by the several parties in proportion to their interests in the mine hills."

All the parties appealed.

The facts in the case are recited in the opinion.

R. C. McMURTRIE and BLACK, for R. and G. D. Coleman.

C. B. PENROSE and E. S. MILLER, for Grubbs.

F. W. HUGHES, G. W. BIDDLE and STRONG (with whom were A. R. BOUGHTEN and J. REYNOLDS), for the administrators of R. W. and W. Coleman.

The opinion of the court was delivered by SHARSWOOD, J.

That the parties to this suit are tenants in common of the Cornwall ore banks ought to be considered as a point settled beyond all dispute. Peter Grubb was the owner in fee simple of a large tract of land, including the three hills of iron ore in question known as the Big Hill, Middle Hill and Grassy Hill. On his death intestate, it descended to his two sons,

Curtis and Peter, Curtis, the elder, taking two shares, according to the then law of the province. From these parties the title is regularly deduced, so that in the year 1786 two third parts were vested in Curtis Grubb and Robert Coleman, and one third part in Burd Grubb and Henry Bates Grubb. An attempt to divide the estate at that time was unsuccessful, it having been found on the report of competent persons chosen for the purpose that, owing to the impossibility of ascertaining the extent and limits of the beds and veins of ore beneath the surface of the ground, the partition proposed could not be carried into execution without the greatest injustice to some of the parties. An agreement was thereupon made August 30, 1787, by which it was stipulated that certain persons named "should make equal partition of Cornwall Furnace, Hopewell Forge and all the lands, plantations, houses and other the real estate, late the property of Curtis Grubb and Peter Grubb, according to quantity and quality and having respect to the true value thereof, and to assign and allot the same according to the real interests and convenience of the several parties, provided always and it is hereby agreed that the ore banks belonging to Cornwall Furnace shall remain together and undivided as a tenancy in common, the said Curtis Grubb being entitled to three sixths parts thereof, the said Robert Coleman being entitled to one sixth part thereof, and the said minor children (Burd Grubb and Henry Bates Grubb) being entitled to the remaining two sixths parts thereof." Amicable actions of partition were entered in the Courts of Common Pleas of Lancaster and Dauphin Counties, and upon the report of the persons appointed, the partition made by them was confirmed. It was adjudged in conformity to the agreement that "the ore banks and mine hills of Cornwall Furnace do still remain undivided, to be held by the said Curtis Grubb, Robert Coleman, Burd Grubb and Henry Bates Grubb, as tenants in common according to their respective shares."

The terms of this agreement and judgment are not susceptible of two constructions. They except the ore banks from the operation of the partition, and declare that they shall remain as a tenancy in common. It is now, however, strenuously contended that the plaintiffs are concluded from asserting this by the judgment in *Coleman* v. *Coleman*, reported in 7

Harris 100—upon the plea of *non tenent insimul*, in an action of partition commenced in the Court of Common Pleas of Lebanon County, for these identical ore banks, and between the same parties. The judgment of *quod partitio fiat* in the court below was reversed in this court. But this judgment is not judicially before us. It is not pleaded nor set up as a technical estoppel in any of the answers, which, on the contrary, expressly admit the tenancy in common, as alleged in the bill; nor indeed was the record given in evidence before the master. How, then, can it be properly adverted to, except so far as the reported decision may settle any principle applicable to this case, in which view any other judgment between other parties and relating to other lands, would be equally available? Besides which it is by no means clear that a simple judgment of reversal in a court of error is such a final judgment as to have the effect of an estoppel: *Aurora City* v. *West*, 7 Wall. 92. The plaintiffs in that action now rely on the judgment as conclusive in this proceeding. Had they prayed for a *venire facias de novo*, and the case been remanded for another trial, the defendants could have withdrawn their plea of *non tenent insimul*, and pleaded specially the covenant of August, 1737, as a bar, which would have avoided the effect of the judgment on the issue as conclusive on the question of the existence of a tenancy in common. It is true that in *Gibbs* v. *Bartlett*, 2 W. & S. 35, Mr. Justice Rogers states that the entry of "judgment reversed" in this court without more, according to our practice, which saves expense and trouble, is a final judgment. That was said, however, in an action on a replevin bond conditioned to prosecute the suit with effect and without delay. It would not, however, be satisfactory to rest the answer to this argument upon such grounds as these. They are mentioned merely to show that they have not been overlooked.

The judgment for the defendants in *Coleman* v. *Coleman*, if, indeed, there was a final judgment, could not have been successfully set up as conclusive on the question here involved. Whenever a judgment is relied on for this purpose, it is competent for the adverse party to show that the particular point was not adjudicated, if in law it could have been rendered upon any other. If any defense was admissible under the plea of *non tenent insimul*, except that the parties were not ten-

ants in common, it may be proved by any competent evidence that the judgment was in fact given upon such other defense. The plea of judgment recovered, itself is said to be mixed of matter of record with matter of fact: *Lytle* v. *Lee*, 5 Johns, 112; *Thomas* v. *Rumsey*, 6 Id. 33; *Wilson* v. *Hamilton*, 9 S. & R. 429. The principle is well stated by Mr. Justice Nelson in *Packet Co.* v. *Sickles*, 5 Wall. 592: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, where the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered to have settled that matter as to all future actions between the parties; and further, in cases in which the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be conclusive."

This principle is clearly illustrated in *Haak* v. *Breidenbach* 3 S. & R. 204, which was an action upon an award for damages to the plaintiff's land between August 10, 1785, and August 4, 1786. The defendant pleaded a former recovery, and gave in evidence a verdict and judgment between the same parties in an action of trespass, the trespass having been laid in the declaration to have been committed August 10, 1785, and continued to November 3, 1788. It was held that the plaintiff might show by parol evidence that the jury in their verdict did not include the damages suffered during the period embraced in the award. "In trespass with a *continuando*," said Chief Justice Tilghman, "the plaintiff may waive the *continuando*, and prove a trespass at any time before the suit brought, or he may give evidence which goes only to part of the time laid in the *continuando*." He added: "If the plaintiff did not in truth recover in the former action

for the time between 10th August, 1785, and 4th August, 1786, he will suffer wrong, unless he recovers in this action. And if he might on the former trial confine himself to part of the time laid in the *continuando*, I see not why he may not now be permitted to show that he did so confine himself, because this evidence does not contradict the record." Now, the case of *Coleman* v. *Coleman*, 7 Harris, 100, must certainly be considered as settling, that under the plea of *non tenent insimul* in partition it may be shown that the parties had bound themselves by covenant not to demand partition—for such in brief was the ruling in that case—that the plea of *non tenent insimul* is the general issue, and means, in other words, that the parties do not so hold together as to be entitled to have partition. It is established by a number of cases in this court that parol evidence may be given to explain and limit the effect of a judgment wherever it is not inconsistent with the record: *Zeigler* v. *Zeigler*, 2 S. & R. 286; *Wilson* v. *Hamilton*, 9 Id. 424; *Cist* v. *Zeigler*, 16 Id. 282. In *Carmony* v. *Hoober*, 5 Barr, 305, the charge of the judge to the jury, which had been filed, was referred to as sufficient to prove on what point the former decision had been made; and though in an action of covenant on the issue joined on the plea of "covenants performed" there had been a verdict and judgment for defendant, the plaintiff was allowed to show by the charge that the judgment had been rendered against him, because, suing as an administrator on the contract of a decedent for the sale of land, he had neglected to have the contract proved in the orphans' court, and was not therefore in a condition to tender a conveyance before action brought, and could not then compel payment of the purchase money. It is clear upon these authorities, which might be multiplied if needed, that if there was a judgment for the defendants in the action of partition on the issue raised by the plea of *non tenent insimul*, it could be explained and limited to its true effect by its reference to the opinion of this court delivered on the writ of error in that case. There it will appear that the position on the part of the plaintiffs in error, which was sustained by the court, and upon which the judgment below was reversed, was that the agreement of August 30, 1787, established a permanent tenancy in common in the ore banks

or mine hills, and that partition of them could not be had without violating that covenant, which ran with the land, and sacrificing important interests which depended on its maintenance.

It is urged, however, that the agreement of 1787 was a partition of the land, in the only way in which it could be parted without injustice, by regulating and providing for the enjoyment of the respective shares in severalty. It has been likened to many other instances in the books where a partition is made by a severance of the enjoyment of the whole. As in the case of a mill when it is provided that one tenant shall have the entire mill for a certain term, and the other for an equal term; or one take one toll-dish, the other another, and so alternately: Co. Litt. 165 a. So of an advowson that the tenants shall present by turns: F. N. B. 62; Vin. Abr. *Partition*, a. 2; *Bodicoate* v. *Steers*, 1 Dickens, 69. In every partition by agreement or judgment there must be a severance, so that each tenant shall thereafter enjoy his purpart in severalty. It is impossible to extract such a severance from the agreement and judgment of 1787. On the contrary they are as express as words can be that "the ore banks and mine hills of Cornwall Furnace do still remain undivided to be held by the said Curtis Grubb, Robert Coleman, Burd Grubb and Henry Bates Grubb as tenants in common according to their respective shares." The clause which has been relied on to show a severance is as follows: "It is hereby declared to be the true intent and meaning hereof that neither of the said parties, their agents or workmen, shall interfere or interrupt either of the other parties at any mine-hole by them opened and occupied for the purpose of raising ore." It is impossible to put any other construction on this clause, taken in connection with the preceding one, that the ore banks shall remain together and undivided as a tenancy in common, than that the parties shall respectively be undisturbed in the enjoyment of their rights as tenants in common to take and use their respective proportions of the ore. It can not be pretended that it allotted to each tenant in common his mine-holes thus opened and occupied as separate and several inheritances. It clearly implied, if it did not expressly grant, the right to open and occupy other mine-holes. It was a covenant of perpetual

peace. Nor is there anything to warrant the inference, which has been attempted to be drawn, that while the title to the soil was to remain in common, there was assured to each party a mining right—an incorporeal easement—separate and distinct from the ownership of the land. If such right was to be unlimited in its extent, it contradicted the express stipulation that the ore banks should be held by the tenants according to their respective interests; but if these supposed mining rights were to be enjoyed only according to those interests, they were *ipso facto* merged in the ownership. A man can not have an incorporeal easement to dig ore in his own fee any more than a right of way over his own close. The incorporeal easement is necessarily extinguished by unity of title and possession. It is unnecessary to consider the operation and effect of the supplementary agreement of the same date as that of August 30, 1787. Whether it gave to the tenants in common incorporeal mining rights under the adjacent soil of the lands assigned and allotted in severalty, or whether it recognized those veins as forming a part of the entire body of ore connected with and belonging to the mine hills as a corporeal hereditament distinct and separate from the surface and remaining in common, are questions which do not arise upon this record. In either case, however, as far as this argument is concerned the result is the same. If it was an incorporeal easement it was annexed to the ownership of the mine hills as an appurtenance thereto, and if it was corporeal it was a part of them. The conclusion then seems to be unavoidable, that by the agreement and partition of 1787 there was no severance of the title or enjoyment of the subject-matter.

Nor, as it appears to me, can it be said that these ore banks were in any sense appurtenant to the other lands comprised in the partition of 1787. The original titles to them by warrants from the proprietaries of May 8, 1732, and December 2, 1737, were separate and distinct from those lands. A thing corporeal can not properly be appendant to a thing corporeal: Co. Litt. 121b. The owners of them and the adjacent tracts might perhaps have limited the use of the ore to the supply of furnaces erected or to be erected on the other lands then held by them in common. There is not a word, however, in

the agreement of 1787 which intimates such an intention. Nor was it ever so treated and considered by the parties. Furnaces erected on other lands owned by them in severalty—Colebrooke, Elizabeth, Mount Hope, Mount Vernon, Manada—some of them at a distance of several miles from Cornwall, were supplied with ore from the banks without any question as to the right. Nothing is clearer or better settled than that if these banks could be appendant or appurtenant to the other lands comprised in the partition, or if that agreement can be construed to give merely an incorporeal easement of digging ore for the supply of furnaces erected or to be erected on those lands, they could not, without the express agreement of all parties in interest, be extended to other lands. An incorporeal easement, such as a right of way, can not be used by the owner of the dominant tenement to pass to other land adjacent or beyond that to which it is appurtenant: *Kirkham* v. *Sharp*, 1 Whart. 323; *Jamison* v. *McCredy*, 5 W. & S. 129.

Nor does it seem consonant to reason or probability that the parties to the agreement intended that the ore should be taken from the respective mine-holes without any liability to account. They were expressly to hold and enjoy, according to their respective proportions. Such a stipulation would be insensible if that was their intention. That nothing was expressly introduced on the subject, and that the parties, their heirs and assigns continued for a period of sixty years to take ore from their respective mine-holes without any question or demand for account, is susceptible of a satisfactory explanation. The tenants in common during all that time were themselves iron-masters, taking the ore to be manufactured into iron at their own furnaces. These were charcoal furnaces, and the use of the ore was in very moderate quantities, and in all probability very nearly according to their respective proportions. The ore in the hills seemed almost literally inexhaustible. Forty millions of tons above water-level, capable of being worked by mere sunlight quarrying, and as much, if not more, below, in the then or any conceivable future condition of their business, rendered it unnecessary to provide for accounts. They did not and could not foresee the introduction of anthracite blast furnaces, nor of new means of easy

transportation by steam engines and railroads, which would make the ore a valuable object of merchandise and sale in distant markets in its raw state. It is enough that there is nothing in the agreement to preclude an account, and in the absence of it, it has not been nor can it be pretended that the mere lapse of time creates a bar or raises a presumption of a grant in the relation in which the parties stood to each other under the agreement and partition of 1787.

Nor is it at all necessary to investigate and decide the question whether tenants in common, taking for their own use a part of the soil itself, as in this instance, could be compelled to account either at common law or under the statute 4 Anne, c. 16, § 27, Roberts' Dig. 48. Much learning and research on this point have been exhibited by the court below and the counsel on both sides in their printed arguments. It may be that under the express authority given in the agreement of 1787 to the tenants in common to work their respective mine-holes, they were constituted bailiffs of each other as to all ore taken beyond their respective proportions, so that if sued in an action of account at common law, they could not have sustained a plea of *ne unques* bailiff. It may be, too, that as to ores taken from the soil itself and consumed or sold by the tenant, a different rule is applicable under the statute of Anne from that which both in England and this country seems well settled as to *fructus industriales*—that a tenant in common does not receive more than comes to his just share within that statute, if he merely has the sole enjoyment of the property, even though by the employment of his own industry and capital he makes a profit by the enjoyment and takes the whole of such profit: *Henderson* v. *Eason*, 17 Q. B. 701; *Sargent* v. *Parsons*, 12 Mass. 149; *Peck* v. *Carpenter*, 7 Gray, 283; *Woolever* v. *Knapp*, 18 Barb. 265; *Dresser* v. *Dresser*, 40 Id. 300; *Nelson* v. *Clay*, 7 J. J. Marsh. 140; *Pico* v. *Columbet*, 12 Cal. 419; *Izard* v. *Bodine*, 3 Stockton, 404; *Ragan* v. *McCoy*, 29 Mo. 356; and see especially as to stone taken from a limestone quarry, *Roberts* v. *Roberts*, 2 Jones' Eq. 133. That there was any liability for waste has not been and could not be pretended; for it is not waste, even in a tenant for life or years, to work mines or quarries already opened, and here there was implied if not express authority

given to make new openings, for the common property could not be fairly enjoyed without such authority. All these questions, curious and interesting as they are, and ably discussed as they have been, are closed, as it appears to us, by the provisions of the Act of Assembly passed April 25, 1850, § 24, Pamph. L. 573, at least so far as this proceeding is concerned. It enacts "that in all cases in which any coal or iron ore, mines or minerals have been or shall be held by two or more persons as tenants in common, and coal, iron ore or other mineral has been or shall be taken from the same by any one or more of said tenants respectively, it shall be lawful for any one of said tenants in common to apply by bill or petition in equity to the court of common pleas of the county in which the lands lie, praying that an account may be decreed and taken of all coal, iron ore or other mineral taken by said tenants respectively; and the said court shall thereupon proceed upon such bill or petition agreeably to the course of a court of chancery, and shall have full power and authority to make all orders, appointments and decrees, interlocutory and final, that may appertain to justice and equity in the premises; and may cause to be ascertained the quantity and value of the coal, iron ore or other mineral so taken respectively by the respective parties, and the sum that may be justly and equitably due by, from and to them respectively therefor, according to the respective proportions and interests to which they may be respectively entitled in the lands." It must be conceded, I think, that this act is drawn with great ability and precision. It can not be doubted that its purpose was to give a remedy more liberal and extensive than those afforded either by the common law or the statute of Anne. The work *take* is carefully used instead of *receive*, upon which the restricted construction of that statute is based. Even the question discussed in the opinion below as to what constitutes a mine in this country is put to rest; for it employs the terms, "mines or minerals held in common," so that ore lying exposed on the surface of the ground is clearly included. It provides that the account shall be taken between all the tenants in one proceeding, and the sum that may be justly and equitable due "by, from and to them respectively" ascertained, so that if, as between any of the parties defendants,

there is a defense in law or equity which can be set up against an account, it can be made available—whether on the answers before the decree to account or afterward before the master, it is not now necessary to decide. That the act applies to and governs this case is clearly stated in more than one place in the opinion of this court in *Coleman* v. *Coleman*, 7 Harris, 110, 112.

It is urged, however, that before any liability to account can arise, it must appear that the co-tenant upon whom the demand for an account is made has actually taken more than his just share or proportion of the entire mass of ore in the beds or banks. It might be enough to say that the Act of Assembly makes no such provision. It applies to any case where coal, iron ore, or other mineral, has been or shall be taken from the common property. It does not say or imply more than a just share or proportion. The remedy would be illusory if such a construction should prevail. No one can tell what the just share or proportion of each tenant will be until the whole mine or bank is exhausted of its entire deposit. In such a mass, practically inexhaustible for generations to come, it would make the one ninety-sixth part equal to the other ninety-five, and really destroy to that extent their proportionate value. As was well said in *Barnum* v. *Landon*, 25 Conn. 150, the case of an iron mine divided into twenty-four shares, "The error of the defendants lies in this: they contend that they own absolutely whatever they get out of the ore bed, if it is not too much, whereas they own only one twenty-fourth part of what they get out, and must account at reasonable times for the other twenty-three parts to the plaintiff."

Concluding then, as we do, that the parties to this proceeding are tenants in common of the ore banks in question in the proportions set out in the bill and admitted in the answers, and that they are liable to account, under the Act of Assembly of April 25, 1850, for all iron ore taken by them respectively, it remains to inquire upon what basis the value of such ore is to be ascertained so as to arrive at "the sum that may be justly and equitably due by, from and to them respectively therefor, according to the respective proportions and interests to which they may be respectively entitled in the land."

It seems that even where a trespass has been committed, if

innocently and unintentionally, by working over a party's own line into his neighbor's adjacent tract, the measure of damages is—besides any actual injury to the land—the value of the mineral or timber taken *in place*, or at the farthest when first severed. There is some conflict in the authorities, which need not now be adverted to: *Morgan* v. *Powell*, 3 Q. B. 278; *Martin* v. *Porter*, 5 M. & W. 351; *Wild* v. *Holt*, 9 Id. 672; *Wood* v. *Morewood*, 3 Q. B. 440, n.; *Bennett* v. *Thompson*, 13 Iredell (Law), 146; *Forsyth* v. *Wells*, 5 Wright, 291; *Lyon* v. *Gormley*, 3 P. F. Smith, 261. In *Herdic* v. *Young*, 5 P. F. Smith, 176—which was an action of replevin—it was held that where the defendant, mistaking his line, had cut logs on an adjoining tract, and then drove them down to the boom in the river below, the measure of damages is the value of the logs in the boom, less the cost of cutting and hauling them to the river and driving them there. But the case of the defendants is entitled to still more favorable regard than that of a trespasser, though by mistake or ignorance. There the plaintiff's property has been taken wrongfully and against his will. Here a tenant in common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking, at the same time, the shares of his companions. The value of the ore in place is, therefore, the only just basis of account. This is the same as the value of what is called ore-leave—that is, what the right to dig and take the ore is worth. Indeed, all parties, as well as the master and court below, seem eventually to have settled upon this basis. But how is the value of ore-leave to be ascertained? It is evident, in the nature of things, that it can have no general market price. It will depend necessarily upon the position and circumstances of each particular mine, as well as on the character of the ore. The value of it at the pit's mouth depends upon its quality and its proximity to the furnace where it is to be used, and on the means of transportation. In addition to this the price of the ore-leave will be influenced by the expense and risk of the process of mining, or of taking it from its place to the pit's mouth. It is evident that the price given for ore-leave in other mines or beds can afford no safe criterion, unless they should be precisely similar in all these respects to the one in question. As to the Cornwall ore

banks no sales had ever been made of ore-leave. No evidence was laid before the master as to what, in the opinion of experts, ore-leave in these banks would have commanded in the market. The master arrived at it by ascertaining the market value of the ore at the pit's mouth, and then deducting from that the cost of mining. We can not see that, under all the circumstances, any more just and equitable mode could have been adopted. We do not mean to say that it would hold in any other case than the one now before the court—certainly not where the mining is expensive and hazardous. Where the tenant in common of a coal mine, for example, must with great outlay of capital construct expensive machinery, and incur all the risks of such an undertaking, the value of ore-leave or coal in place could not be ascertained by so simple a calculation. The usual profits on capital embarked in such a hazardous enterprise, with the proper allowance for personal skill and superintendence, would seem to be no more than fair and reasonable deductions. Certainly, any business man, sitting down to calculate what he ought to give for ore-leave, would take all these elements into consideration. Otherwise, with his own capital and at his own risk, he would separate the ore from its natural position and place it on the surface enhanced in value, for the benefit of a stranger. We leave the rule in such a case to be determined when it arises. But the case of the Cornwall ore-banks is very different and very peculiar. Very little outlay of capital was required; the wages of day laborers and the pick-axe and shovel, with occasional charges of powder for blasting, made up all that was to be provided. The returns were immediate; the ore was removed to be used or sold as soon as loosened. No personal skill or superintendence by the tenants in common was shown, and whatever was necessary was hired and allowed in the cost of mining. Besides, upon the determination of the master and court below on the subject of interest, and which for this and other reasons we think was right, the proceeds or value of the ore in the hands of the defendants, who took more than their proportion, remained in their possession to be employed by them as capital without charge. No interest account is made out, except from the time of closing the account, January 1, 1859. No possible hazard of loss was incurred, except that of bad debts,

but with that the tenants calling for the account had nothing to do. The value at the pit's mouth is the cash value, that for which it might have been sold for cash, and, indeed, it would hardly seem questionable that one tenant in common, after mining any determinate quantity, might separate his own share, and give notice to the other tenants to remove theirs. The tenants at their respective mine-holes under the agreement of 1787, may have been bailiffs of their companions to dig and take, but certainly, they were not their bailiffs to manufacture or sell. If they were, the account must be settled on entirely different principles. The peculiarity in the ore-banks now in question can not perhaps be better stated than in the language of the defendants, Robert Coleman and George Dawson Coleman, in their further answer, which dispenses with the necessity of a reference to the testimony of the witnesses, which fully confirms it. "The uniform mode of working these hills for a century past has been by superficial diggings in the manner usual in leveling hills or digging gravel from hills or mounds thereof above the surface of the land, when the intent was to remove the whole of the hill and level the site thereof. There has never been any subterranean working for iron ore, nor any of the expensive contrivances usual in mining; the work has always been prosecuted by daylight, and there have been no cuttings or excavations of greater depth than thirty feet, except the cuttings in the breast of the hills from the base or near the base, and which have been thus worked into and upon the face of the hill to a greater depth, but never lower than the level of the road, by which the ore, when dug, is carried away. The motive for making these deeper cuttings, rather than continuing the surface diggings, has been the greater convenience of loading in railway cars, which are brought to the side of the hill. In no case has there been any work done in getting iron ore in the manner of ordinary mining, but always by such superficial and surface diggings as have been described. And the workings are in another particular varied from that usual in mining, viz.: that the whole body of the hill, which is dug into, as well that which lies below the surface as the surface itself, is carried away and used as iron ore for smelting. * * * Nor is there nor can there be for years to come any distinction between the respective owners, either in the facility of working or in the quality of the ore."

Upon the whole, then, we are of the opinion that, looking at the peculiar character of these ore-banks, and the evidence submitted by the parties, the master and the court below adopted the true mode of ascertaining the value of the ore and arriving at the sums justly and equitably due by the respective parties, who had taken it in excess of their shares.

In regard to the conclusions of the master upon the evidence as to the market value of the ore at the pit's mouth, the deductions proper to be made, and the other questions of fact passed upon by him, we see no reason for the court below to interfere. The office of a master in chancery is like that of a jury in the courts of common law. If there has been a clear mistake or a palpable abuse of power, either of them ought to be corrected. But if anything should be done or inquiry instituted beyond that as to matters of fact, the office of master would prove but little aid in the administration of justice—the court being compelled to go over all the evidence again, and thus their labors be greatly and unnecessarily increased: *Mason* v. *Crosby*, 3 Woodb. & Minot, 258. The numerous and varied exceptions to the master's report and to the proposed decree were, as we think, properly disposed of by the learned court below.

Decree affirmed; appeals dismissed—the costs of these appeals to be paid by the parties in proportion of their respective interests.

IRVINE v. HANLIN.

(10 Sergeant & Rawle, 219. Supreme Court of Pennsylvania, 1823.)

Assumpsit—Ore paid for by mistake. One tenant in common can not maintain assumpsit against another to recover the price of certain ore, paid by the former to the latter under the mistaken supposition that the latter, the defendant, had exclusive title to the land where the ore was dug. Account-render would be the proper remedy.

[1] **Indebitatus assumpsit** will not lie by a person claiming title against one who enters on land as a trespasser, to recover the issues and profits received by him.

Baker v. *Howell*, 12 M. R. 73; see *Murley* v. *Ennis*, Id. 360.

Money paid voluntarily by one knowing, or having the means of knowing his rights, *it seems*, can not be recovered back.

In the Court of Common Pleas of Westmoreland County, to which this writ of error was directed, Boyle Irvine, the plaintiff below and plaintiff in error, brought this action of assumpsit against William Hanlin to recover the value of certain ore, and a verdict and judgment were rendered in favor of the defendant, the court below having charged the jury that the action was not maintainable. The circumstances of the case appeared on the trial to be as follows:

James Hanlin, an infant, and Boyle Irvine were tenants in common of a tract of land from which the ore was taken, for the price of which this action was brought; five eighths of the land belonged to Irvine and three eighths to James Hanlin. The defendant, William Hanlin, acting as guardian for James Hanlin, had made a parol partition with the person under whom Irvine held and agreed upon a consentable line, by which the land from which the ore was taken fell to the infant's part. William Hanlin, as guardian, brought an ejectment against Irvine, for a part of the tract which was supposed by this partition to belong to James, and Irvine brought a writ of partition. Irvine finally succeeded in both actions and his right as tenant in common was established and the partition decided not to be binding. During the pendency of these proceedings Irvine and one Benninger carried on a furnace in partnership, and they bought ore taken from the land of which James Hanlin and Irvine were tenants in common, and paid William Hanlin for it partly in money and partly in tobacco and other articles. A part of the ore was bought by Benninger. And to recover his share of the money thus received by William Hanlin, from Benninger and Irvine and from Benninger alone, this action of assumpsit was brought by Irvine. William Hanlin was not at the time appointed guardian, and the infant's mother was then living. The question was whether Irvine could recover in this form of action the five-eighths part of the value of the ore thus received by the defendant.

The case was argued by FOSTER for the plaintiff in error.

ALEXANDER, *contra*, was stopped by the court.

The opinion of the court (TILGHMAN, J., being absent) was delivered by DUNCAN, J.

It may be proper to dispose of the suggestion of the counsel of the plaintiff in error, that William Hanlin received part of the money in his own wrong when he was not the guardian, and therefore no action of account-render would lie against him for this. If this be so, then it is very clear the action for money had and received will not lie against him, if he was a trespasser and intruder; for in *Haldane* v. *Duche*, 1 Yeates, 129, Judge Yeates, in an elaborate opinion which he had prepared, but which was not publicly delivered, shows clearly that the obiter resolution in 2 Mod. 263, that *indebitatus assumpsit* will lie for rent by one who pretends a title, because in such action account would lie, is not warranted by the authorities, but all the authorities, many of which he cites, are to the contrary, and it is an unanswerable objection to this form of personal action, that the title to the land could not be tried: *Mather* v. *Trinity Church*, 3 S. & R. 516. But where a person enters claiming as guardian, and receives the profits of land in that character, he would be responsible to the infant as guardian, and accountable as bailiff, and if he would be accountable to him he would be considered as the bailiff of both tenants in common.

These are insuperable objections to this action. In the first place the money was paid voluntarily, both by Benninger and Irvine, to William Hanlin, claiming a right. William Hanlin, with a good conscience, received the money. There was no deceit or unfair practice in obtaining it, although it was money which the party could not recover by law. This action has never been extended so as to enable the party to recover back money which he has voluntarily paid: *Morris* v. *Tarrin*, 1 Dall. 148. Where a party pays money with full knowledge, or the means of such knowledge in his hands of all the circumstances, he can not recover it back again on account of such payment being in ignorance of the law. Now Irvine had full knowledge; suits were pending to try the very right. There was no ignorance of the facts, and he could not suppose the law was against the very right he was prosecuting. Nor can a man who pays money voluntarily ever recover it back, though paid under the expectation of recovering it back. On

this principle, I am very clear, this money could not be recovered back in this action from the defendant.

This is my opinion, but this cause is decided on another principle, that if the plaintiff could recover at all, it must be in an action of account-render against the defendant, the guardian of James Hanlin, as bailiff and receiver, or in trespass.

Whether the plaintiff would have any remedy before the Stat. 4 Anne, c. 16, Sec. 27, it is unnecessary to say; for the statute gives a remedy by one tenant in common against another by action of account-render. But this action of account-render is different from the action at common law; for at the common law a bailiff is not only answerable for his actual receipts, but for what he might have made out of the land without his willful default. But by the plain words of the statute a tenant in common, who is sued as bailiff, is answerable only for so much as he has actually received, more than his just share. Second, the auditors at common law could administer an oath only in two particular cases. Here they may examine the parties on oath. The declaration should therefore state that the parties are tenants in common, and that the defendant has received more than his share; for unless it appear in what capacity he is sued, the auditors can not tell how he is to account, or whether they are to examine him on oath; for if he is charged as bailiff generally, the plaintiff will be non-suited, unless he can prove the defendant was actually his bailiff as at common law: *Wheeler* v. *Horne*, Willes, 208. Now the very act of possession by one tenant in common converts him into bailiff and receiver of the other, and the defendant certainly, unless there was an actual ouster of Irvine, would hold in the character of tenant in common with him.

By bringing this action the defendant is deprived of the benefit which the statute giving this right of action of account-render confers on him, that of examination before the auditors on his own oath.

After a recovery in ejectment, that the tenant is liable in *indebitatus assumpsit* to the plaintiff in ejectment as for money had and received, is a position which is without the support of any principle or any authority. It would be converting a local into a transitory action. *Haldane* v. *Duche*,

2 Dall. 176. 1 Yeates, 121, is very far from supporting this position. That was a very special case, in which Duche would be considered as a trustee in a court of chancery. It is there put by C. J. McKean on the circumstance of Duche being a *mala fide* possessor; he concealed the title of his adversary from him, and misrepresented his own, and Mr. Justice Yeates, denying the doctrine that assumpsit for money had and received, or for rents, would lie against the tenant, puts the case solely on chancery principles—that chancery would decree an account of rents and profits where there has been fraudulent conduct and concealment by the party holding possession against the rightful owner—but that the loss of the action of trespass for mesne profits by the death of the tenant, enables the owner to maintain an action for rents or profits, is not warranted by any authority. It dies like other personal actions with the person. For, as is stated in a very able treatise on the law of ejectment, Adams' Eject. 331, the action for mesne profits is an action of trespass. It can not be maintained against executors or administrators for profits accruing during the lifetime of the testator or intestate, nor will a court of equity interfere to enforce the payment of them against the personal representatives when the plaintiff is deprived of them by the mere accident of the defendant's death. But where the lessor was delayed from recovering in ejectment by a rule of the court of law, and by an injunction in equity in behalf of a party who ultimately failed, both in law and in equity, the court decreed an account of the mesne profits against the defendant's executors.

The possession of one tenant in common is the possession of both; but if William Hanlin did not receive the money as a tenant in common entering as guardian to James, but as his own money, claiming the whole profits against Irvine, and refusing all participation with him, this would be an ouster; for this is not a silent possession, which would not amount to an ouster, but an actual adverse possession, and refusing to let Irvine in, denying his right, and exacting from him payment for the whole ore, claiming a right to the whole land from which it was taken. If such was the fact the defendant would not be responsible in this form of action. Whether he would in an action of account-render, it is not necessary now to de-

cide, as our opinion is, in no view which can be taken of the case and in whatever light the defendant's entry and possession is considered, he is not accountable in this form of action.

Judgment affirmed.

ALLEN ET AL. V. BARKLEY ET AL.

(1 Speers' Eq. 264. Court of Appeals of South Carolina, 1842.)

[1] **Rental value treated as proper measure of damages on suit for account.** In an action by tenants in common of an undivided interest against their co-tenants who had claimed the whole under conveyances inoperative as against the complainants, it appeared that defendants had worked the land for gold. It was proved that the uniform usage was for lessees to allow to the proprietors one fourth of the gold found, clear of all charge of expense, and this was adopted as the measure of accounting. *Held*, a proper decree, and preferable to taking a strict account of the profits and expenses.

[2] **Expenses of litigation.** The defendants while in possession of the premises incurred expenses in defending their title at law against a person claiming by title paramount. *Held*, that the complainants were not bound to contribute their proportion of expenses in defending against such suit.

Before DUNKIN, Ch., at Lancaster, July term, 1842.

The complainants, Mrs. Allen and Robert and Sarah Beard, were the grandchildren of Robert Barkley, who claimed a share of a tract of land, through their mother, Mrs. Catherine Beard. They were minors at the time the bill was filed. The defendants had purchased from James Barkley, who conveyed to them during the life of Mrs. Beard; she was a *feme covert*, and never conveyed her title.

The title of the complainants was fully sustained by the decree of the court, and a writ of partition and an account of rents and profits ordered between them and the defendants, the defendants being in possession. The principal question, as to rents and profits, related to the profits of a gold mine which

[1] *Early* v. *Friend*, 14 M. R. 271.
[2] *Charles* v. *Eshleman*, 2 M. R. 65.

was situated on the land. By the bill the defendants were required to set out the proceeds of the mine and the expenses of working it. By the exhibit filed with their answer it appeared that the production of the mine, in gold and silver, amounted, as stated in the report of the commissioner, to $5,771.44, and that the expenses, including some costs of a suit at law which had been brought against them for the land, amounted to $1,936, leaving a balance of $3,665.44 as the profits to be divided, as the complainants contended, between themselves and the defendants, as tenants in common; and if the defendants are not to be allowed their expenses in defending their title in the suit brought, the profits would be somewhat more—those expenses, as set out in the exhibit of the defendants, being $148.

The case came up upon exceptions to the commissioner's report, who, in making up the accounts, did not take the exhibits as evidence and make them the basis of his calculations, but heard testimony of an usage to allow one fourth of the proceeds of the gold mines to the proprietors, and allow three fourths to the operatives for their work and labor. By the operation of that rule in this case, the parties being tenants in common, and the defendants the operatives, they get three fourths for their labor, leaving one fourth to be divided between themselves and the complainants. According to the calculations of the report, the one fourth to be divided would amount to $1,442.86, making a difference against the complainants of $2,222.58, if the expenses of the suit at law be allowed the defendants, and a difference of $2,370.58 if the said expenses be not allowed.

As the whole work was done in a few months, chiefly by the defendants themselves in the interval of making their crop, the complainants thought the allowance enormous; and as their title was in no way involved, or their interests put in jeopardy, by the suit at law brought against the defendants by some third person, considered it iniquitous that those expenses should be charged to them.

They therefore filed the following exceptions to the commissioner's report:

1. That the commissioner should not have adopted the usage (as it is called) of allowing one fourth to the owner of

the mine as the measure of rents and profits in this case, but should have made an estimate of the actual value of the profits of the mine, and should have taken testimony as to the expenses, and have struck the balance.

2. That the complainants, being minors, are not bound by the usage, if any such usage exist.

3. That the commissioner should not have allowed the expense of the defendants, Belks, in defending their title at law, and in opposing the injunction, as a charge against the complainants.

Upon hearing argument the chancellor pronounced the following decree.

DUNKIN, Ch.—The court can add nothing advantageously to the reasoning of the commissioner, in reference to the subject-matter of the complainants' first and second exceptions. It is only to place the same thing in a different light, to say that the owner of a mine is obliged to pay one fourth of the product for the labor and risk of working it, and the requisitions of the complainants' argument are met. It is believed that the custom is not, in principle, peculiar to gold mines—fisheries and oyster banks yield a profit to the proprietors in the same way. As to the third exception, the case of Mrs. Hall, in *Manigault* v. *Deas*, 1 Bail. Eq. 283, seems conclusive. The exceptions are overruled and the report confirmed.

The complainants appealed from the said decree, and relied in this court upon the grounds made in the above stated exceptions and upon the following additional ground.

That from the language of the decree, it appears to have been made under the misapprehension that one fourth of the products were allowed to the operatives, instead of three fourths—to the allowance of which the complainants would not have objected, as it does not exceed the actual expenses.

MCCALL, for the appellants, cited Jacobs' Rep. 297; 1 Eq. Rep. 191; 2 Story's Eq. 325.

CLINTON, *contra*, cited 6 Ves. 93; 7 Id. 540.

Curia, per DUNKIN, Ch.

The complainants were the grandchildren of Robert Barkley. As the heirs at law of their mother, Mrs. Catharine Beard, they claimed four twenty-sevenths of a tract of land, on the Catawba, on which was a gold mine. The defendants, Robert and J. W. Belk, had purchased the land from James Barkley, who acted under an authority from the heirs of Robert Barkley, the person last seized. The power of attorney was executed by the mother of the complainants, while she was a *feme covert;* and under a decree heretofore pronounced, the claim of the complainants was sustained, and they were declared entitled, among other things, to an account of the rents and profits.

In taking the account, the commissioner received the testimony of several witnesses, who proved that, in mining operations, the uniform usage was to allow to the proprietor one fourth of the gold found, clear of all charge of expenses in conducting the operations. One of the witnesses, a practical miner of experience, testified that this was the highest rent he had ever known allowed. There was no diversity in the testimony, and the commissioner adopted this rule in raising the account, which was confirmed by the court.

The complainants excepted to the report, and now appeal from the decision of the chancellor on the ground that "the commissioner should have made an estimate of the actual value of the profits of the mine, and should have taken testimony as to the expenses, and struck the balance, especially as the complainants were minors."

This court is satisfied with the judgment of the commissioner approved by the chancellor. The defendants (the Belks) can in no manner be regarded as the trustees of the complainants; on the contrary, they claimed adversely to them, and the complainants are only entitled to the rents and profits which, as proprietors of the land, they would have received from any other person. The witnesses proved what was the rent usually allowed. The mode of ascertaining it is not peculiar to mining operations. Fisheries and oyster banks yield a profit to proprietors on a similar principle.

While the defendants were in possession of the premises a suit was instituted against them by Matilda Briggs, claiming by title paramount. In the successful defense of this claim, the

defendants incurred an expense of one hundred and twenty-five dollars, or thereabout, and insisted that the complainants contribute their proportion, being about nineteen dollars, which claim was allowed by the commissioners, and confirmed by the chancellor.

We have just held, that the defendants could not be regarded as trustees for the complainants. It was not an expense incurred in the protection of a common fund, as in *Manigault* v. *Deas*, cited in the circuit decree; and, although the amount is small, the court can perceive no principle on which it should be allowed. In this particular the commissioner must correct his account, which is in all other respects confirmed, and the appeal dismissed.

HARPER and JOHNSON, chancellors, concurred.

BARNUM ET AL. v. LANDON ET AL.

(25 Connecticut, 137. Supreme Court of Errors, 1856.)

Action of account at law. The statute providing that whenever a suit shall be instituted against two or more defendants to compel them to an account, it shall be by bill in equity, has reference to where defendants are sued to answer severally and not as joint bailiffs or partners who have a common defense.

Declaration need not charge taking excess. A declaration charging the defendants as joint bailiffs of the plaintiffs of iron ore taken from a bed occupied by both parties as tenants in common: *Held*, sufficient without charging that defendants had taken more than their share of the ore.[1]

Lease, good without record. A lease is valid without record, between the parties and all others not entitled to the notice which is the object of the recording acts.

[1] **Lessees are co-tenants.** A lessee of a part interest is a co-tenant, and as such liable to action of account.

Each liable to all the others. A co-tenant can not mine so as to extract just his proper proportion of the mineral and refuse to account. He owns only his proper proportion of what he takes out and must account for their proportions to his co-tenants.

Demand—Periods of accounting. Account will not ordinarily lie until after demand, and then only at reasonable periods. An annual accounting is usual and reasonable.

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[1] *Manville* v. *Parks*, 7 Colo. 128.

Liability of lessees. Whether the lessor or the lessee of a fractional interest is the party to be held to an account depends upon the question as to which of them was in possession receiving the rents and profits; the payment of rent by the lessee to the lessor of the fractional interest, is no defense to the action for an accounting,

Mortgagee, not a necessary party. A mortgagee who has not completed his foreclosure so far as to obtain possession, is not a co-tenant and not a necessary party to an action for an account.

This was action of account by Milo Barnum, Leonard Richardson, and William H. Barnum, partners, doing business under the name of Barnum, Richardson & Company, against Horace Landon, Schuyler Pratt and Charles E. Botsford, as partners under the name and firm of Landon & Co. The declaration contained three counts, on the first and third of which only was a verdict rendered.

In the first count the plaintiffs called upon the defendants to render their reasonable account for the time during which they were bailiffs of the plaintiffs; alleging that, from the first day of April, 1853, until the first day of January, 1854, the defendants as such partners, as bailiffs of the plaintiffs, had possession of twenty-three undivided twenty-fourth parts of two thousand tons of iron ore, situate in said Salisbury, of the value of five thousand dollars, which the plaintiffs, as partners aforesaid, and the defendants, as partners aforesaid, owned together as tenants in common; and the defendants, as partners aforesaid, had possession of the other one undivided twenty-fourth part of said iron ore, in their own right. And, during all that time, the defendants had the care, management and use of said iron ore, to sell and dispose of the same for the advantage and profit of the plaintiffs and defendants, and to render a reasonable account thereof to the plaintiffs when the defendants should be thereto requested.

The third count, after alleging that the defendants as bailiffs of the plaintiffs had the possession and care of a certain ore bed as tenants in common with the plaintiffs, was substantially like the first.

The defendants pleaded the general issue, upon which the cause was tried at the term of the superior court holden in January, 1856.

On the trial, among other evidence the plaintiffs offered a lease, under which they claimed a portion of their interest in

said ore and ore bed, the execution and delivery of which lease to the plaintiffs, and their occupation of said ore bed under it, were not denied; but the defendants objected to its admission, because it was not acknowledged and recorded. The defendants did not claim that they were injured or affected by said omission to record, nor did they claim any interest under any of the lessors; but they insisted that the lease was a nullity unless recorded. The plaintiffs insisted that as against the defendants it was good as a lease and a license; and, as connected with their possession, was admissible to support the averments in the declaration. The court admitted the lease and it was read to the jury.

To prove that the defendants were tenants in common with the plaintiffs, as alleged, the plaintiffs offered in evidence a lease from Forbes Munson to the defendants, which was as follows:

Know all persons that I, Forbes Munson, of Canaan, in consideration of the agreement of Horace Landon, Schuyler Pratt and Charles E. Botsford, of Salisbury, dealers in company, by the name of Landon & Co., do demise, lease, and to farm let, to said Landon, Pratt and Botsford, the one undivided one-fourth part of one-sixth part of that certain ore bed, situate in said Salisbury, called the *Davis Ore Bed*, of which Samuel Forbes, late of Canaan, deceased, died seized; to have and to hold the same for the period of two years, from the first day of April next, and the said lessees shall have the right in the same and as ample manner as I, the said lessor, have to enter upon said premises and take ore therefrom, and may, during said term, dig and carry away from said bed, all such quantities of ore as they may find convenient, under my right, exercising said right in a prudent manner according to the usages of digging ore in said Salisbury, but said lessees shall not underlet, and are to surrender up said premises at the expiration of said two years.

And the said Landon, Pratt and Botsford, in consideration of the premises, agree to commence digging on said right some time in April next, being first put into possession of the same by said lessor, and to use all proper and reasonable means to raise at least one thousand tons of ore from said bed each of said years, provided they may have the lawful right

to do so, under this lease; and for all the ore obtained at said bed under this lease during the first year, said lessees agree to pay said lessor the sum of fifty cents per ton, provided the quantity so obtained shall amount to one thousand or more, but if it shall fall short of one thousand tons then they agree to pay seventy-five cents per ton for the quantity so obtained the first year; and they also agree to pay the like sum of fifty cents per ton for the quantity obtained the second year, provided the same shall amount to one thousand tons or more; but if the quantity so obtained the second year shall fall short of one thousand tons, they agree to pay the like sum of seventy-five cents per ton, for the quantity obtained the second year; payments to be made at the end of each year, and said lessees agree to use reasonable means and diligence to obtain at least the quantity of ore from said bed above named, and in case they shall omit to use such diligence, this lease shall be void, and said Munson may re-enter and take possession of said premises. And it is agreed that said lessees may, from time to time, require the directions and instructions of said lessor, as to the use and occupancy of said premises. And if they follow the directions of said lessor, and shall thereby be subjected to any law suit or costs of litigation, said lessor shall pay and bear all expense thereof. And it is also agreed that said lessees shall commence digging ore on said right, under this lease, during the month of April next, as aforesaid; and continue to exercise said right, in the manner before specified, unless hindered or obstructed in such manner as to make it unprofitable for them to pursue said business; in which last named case said lessees may abandon and surrender this lease to said lessor, paying him according to the terms of this lease, for all the ore taken from said bed.

In witness whereof, etc.

The defendants objected to the reception of this lease, claiming it to be merely a license, and that it did not prove that the defendants were co-tenants with the plaintiffs, but that the defendants, under it, were mere servants, and that said Munson was co-tenant with the plaintiffs of the one twenty-fourth part. It was proved that the defendants were put into possession of the said one twenty-fourth part of said ore bed upon the execution of said lease by Munson, and that the defendants had ever

since enjoyed said right upon the terms of said lease. The court overruled the objection, and the lease was read; and it was held by the court to be a proper lease, vesting a definite interest in the defendants, and that thereby, and with actual enjoyment and possession by the defendants, they were not mere servants of said Munson, but might become and were co-tenants with the plaintiffs.

It was proved that the manner of using said ore bed had ever been, for the lessees and owners to dig ore annually, and to pay the agreed rent in cash in January, each one receiving his own share; and that rent was paid for said twenty-three twenty-fourths parts so occupied by the plaintiffs, for the year 1853, to one Adams; that said use of said bed was the usual and only use to which it could be put; that during that year the defendants did not, but the plaintiffs only did dig ore in said bed and raised and placed at the mouth of the pit in a pile, some 10,000 tons, of which the defendants took and carried away about 1,400 tons, and more than their one twenty-fourth part of said pile, insisting that the ore belonged to them as tenants in common with the plaintiffs. The plaintiffs did not deny the right of the defendants, but insisted that they must account for it and pay for what they had taken beyond their share. The defendants insisted that it did not appear that the 1,400 tons so taken by them was more than their one twenty-fourth part of their interest in the entire ore bed which they held under their lease from said Munson, being some five acres in extent; and hence they claimed and asked the court to instruct the jury that the defendants could not be required to account. The court did not so instruct them.

It was proved that in the year 1842, Thos. Fenn received of one Joclyn a mortgage deed of a small interest in said ore bed, viz.: one-fourth of one-fifth of one-sixth, which was then owned by said Joclyn; after which the plaintiffs purchased of said Joclyn, or her legal assigns, all her interest as mortgagor in said portion. The said mortgagee did not take possession of the interest so mortgaged, nor do anything about the same, until in 1852, when he obtained a foreclosure. The plaintiffs insisted that said Fenn had never taken possession, but had left his mortgagor, and the plaintiffs, as her assigns, in possession, and that they had for years previous to and down to the date

of the writ, and since, held possession of and used as their own, all the rights in said ore bed, except the one twenty-fourth part vested in the defendants by their lease from said Forbes Munson.

The defendants insisted, notwithstanding the facts claimed aforesaid, that said Fenn was, during all the time from the first day of April, 1853, to the first day of January, 1854, a co-tenant in the use of said ore bed, and, as such, was interested in all the ore dug during said time, and should have been joined as a plaintiff in the case. The court held that all who were co-tenants must unite; but that the question was, who were the real co-tenants during said time, viz., from first April to first January; that a mere mortgagee of an interest in such ore bed, whether before or after foreclosure, who had done nothing toward taking possession, but left the mortgagor and her assigns in possession, was not a co-tenant in the use of said ore bed. And the facts in relation thereto were left to the jury.

The defendants further claimed that they had, for their use of said ore bed, under their said lease from said Munson, paid him according to the terms of the lease, and therefore could not be obliged to account with the plaintiffs. The court held that the real co-tenants, who, as such, took the ore during the time in question, must account among themselves; and that if the defendants paid their lessor, yet they must still account with their co-tenants for all they had got beyond their own proportional share.

The plaintiffs offered evidence to prove that in January, 1854, they paid to one Adams, of Salisbury, the rent of the entire ore bed, for the whole year 1853, during which the plaintiffs occupied it under said lease to them, including said interest mortgaged to Fenn, but not including the said one twenty-fourth part occupied by the defendants. That for some years before 1853, the plaintiffs had occupied said twenty-three twenty-fourth parts as during said year 1853, and paid said annual rent to Adams, who had acted, and still continued to act, as agent to receive said rent for all the owners, except the defendants; that in June, 1854, said Adams paid to Fenn the amount of his interest in the rent of said ore bed for 1853, as expressed in said lease, and Fenn received the

same from Adams in said character. The plaintiffs claimed that this reception of rent by Fenn tended to prove that the plaintiffs had occupied said twenty-three twenty-fourth parts as lessors or owners in their own right, and had paid therefor, and that it tended to prove other matters alleged in the declaration. The defendants objected to it because the receipt of said money by Fenn, through said Adams, was subsequent to the date of the plaintiffs' writ. The court overruled this objection, and the evidence was received.

It was proved that the defendants had taken from a pile of ore dug by the plaintiffs as lessees as aforesaid, in 1853, 1,400 tons of ore which they had disposed of by using it in their own furnace, and not otherwise. The defendants objected to this evidence as not conducing to prove the declaration. The court overruled the objection, and admitted the evidence.

The jury returned a verdict that the defendants should account. The defendants thereupon moved for a new trial. They also moved in arrest of judgment on the ground of the insufficiency of the declaration.

J. H. HUBBARD, GRANGER and RUSSELL, in support of the motion.

WOODRUFF, WARREN and PEET, *contra.*

ELLSWORTH, J.

The motion in arrest is placed on two grounds. First, the want of jurisdiction in the court, and second, the insufficiency of the allegations in the declaration. As to the first, it is said our statute requires that "whenever an action shall be instituted against two or more defendants, to compel them to render an account, it shall be by bill in equity." Rev. Stat. 478. And as there are here three defendants, the plaintiffs have mistaken their remedy, which was in equity and not at law. This objection proceeds upon an entire misapprehension of the statute. The statute has reference to cases where the defendants are sued to answer severally, each one upon his own individual responsibility, and not as joint bailiffs or partners, where the defense is one and the same, and the defendants strictly but

one defendant. What has this action or what have these plaintiffs to do with the relations of the defendants among themselves? That matter has no bearing upon the joint duty of the defendants to account with the plaintiffs for what they have taken as joint bailiffs or partners, of the use and profits of this ore bed, beyond their proportion of one twenty-fourth part. If the plaintiffs are obliged to go beyond their own claim on all the defendants, and to bring in here for adjustment matters about which they care nothing, the relations of the defendants among themselves, the plaintiffs can never recover in this court or any other. As we have said, the liability to account is joint, and each defendant can avail himself of whatever goes to save himself or the other defendants from the cause of action stated in the plaintiffs' declaration. To go beyond this would be irregular and absurd.

As to the objection that it is not stated in the declaration that the defendants have taken as tenants in common of the ore bed more than the amount of their interest (one twenty-fourth part) in the principal estate, we think it entirely groundless. Cases have been cited to show that such an averment is necessary where the action is brought on the statute which gives a tenant in common an action of account against his co-tenant. However this may be in the cases cited, which we are not called to consider, there is no propriety in urging it here, especially as the objection arises after verdict; for in the counts on which there is a verdict for the plaintiffs, the defendants are sued as *bailiffs* of the plaintiffs, of a certain quantity of ore. Now, a bailiff is defined to be "a servant that has the administration and charge of lands, goods and chattels, to make the best benefit for the owner, against whom an action of account lies, for the profits which he has raised or made, or might, by his industry or care, have raised or made." Co. Lit. 172. This allegation is found to be true by the verdict, and therefore the defendants have no right to say that they are not bailiffs at common law, and are not called to account as such.

We come now to consider the supposed errors in the charge of the judge. The plaintiffs, in order to prove their title to their twenty-three parts of the ore taken by the defendants, and their title to the ore bed itself (the whole being twenty-

four parts), offered in evidence a lease, for four years from the 1st of January, 1851, of most of their interest, from persons admitted to be owners of the estate, conveying to the plaintiffs the ore bed for the four years. The lease was in due form of law, and in all respects complete and perfect, except only that it had not been recorded in the town records of Salisbury, the town in which the ore bed lay. This was the only objection to the lease. The defendants insisted that it was by the statute declared to be absolutely void, except as to the lessors; not that they claimed anything themselves under the plaintiffs' lessors, or were deceived or in any way injured by reason of the lease, but it was not recorded, and therefore an imperfect and void instrument. Our answer to this is, the instrument was not imperfect and void. It had every legal requisite of a conveyance, and if a legal and perfect instrument between the parties, what have the defendants to say against it, when the plaintiffs come forward to assert their rights under it—rights which none but creditors and purchasers can properly deny or resist? Recording is no part of the conveyance itself, and to allow a stranger who has no manner of interest in the question, to set up a statute which requires deeds and leases to be recorded, merely to give public notice, that creditors and *bona fide* purchasers may not be deceived and cheated, is unreasonable and preposterous. A majority of the judges in the case of *French* v. *Gray*, 2 Conn. 92, held this extraordinary doctrine, but that decision has never been satisfactory to the profession, and at the time it was made it was opposed by some of the ablest members of the court. Swift, Ch. J,. Goddard, Hosmer and Gould, Justices.

Again, it is said that the defendants were not occupying the ore bed as co-tenants with the plaintiffs, or in their own personal right, but as the mere servants or licensees of Forbes Munson, and that the plaintiffs should have sued him as the real co-tenant, in the possession and enjoyment of the rents and profits. Not so. In March, 1853, the defendants took a lease from said Munson, of all his interest and right to dig in said ore bed for the next two years, and were put into possession of said share in their own right. The lease was most full and formal in its language, and was a complete transfer of the interest of the lessor to the lessees.

It follows from this that the defendants were the co-tenants of the plaintiffs, and liable to account for the rents and profits.

Again, it is said that the court should have charged the jury that the plaintiffs could not call upon the defendants to render their account, unless they proved that the defendants had taken more than one twenty-fourth part of the entire ore bed. If this were true, it would destroy the value of this bed, and of such joint property as this, everywhere; for, in effect, the smallest interest in one tenant would thereby be as available and as valuable as the greatest interest in another. This bed embraces some five acres of land, and how deep the ore extends, and what is its quality and productiveness, no man can know, and if no co-tenant can be called upon to account for what he obtains more than his share, until all this ore bed is exhausted, there will be no accounting at all, and one twenty-fourth part, as we have said, would be as good as the other twenty-three parts. The error of the defendants lies in this: They contend that they own, absolutely, whatever they get out of the ore bed, if it is not too much, whereas they own only one twenty-fourth part of what they get out, and must account, at reasonable times, for the other twenty-three parts to the plaintiffs; and the objection that this will subject them to account from day to day, and for each load or pound of ore, is equally applicable to all bailiffs and receivers where the property taken is taken in parts or parcels, as where one tenant takes from day to day the entire use and profits of a farm or of a wood lot. Whenever the relation exists, it gives rise, of necessity, to a liability to account, but an action will not lie, ordinarily, until after demand, and then only at reasonable periods. In most cases the parties who severally occupy property owned by a joint title, as an ore bed, quarry, etc., find it necessary to enter into some mutual arrangement for the use and occupancy of it; or where each digs and carries away at his own pleasure the soil or ore, for the time of reckoning with each other, and adjusting balances either annually or oftener, if circumstances require it, just as had always been done with this ore bed until the defendants took their lease of a very small interest from said Munson; and if now the defendants will not come into any proper arrangement for the enjoyment of this ore bed, the law will hold them liable to account, at reasonable times,

for whatever use they make of the common property for their exclusive benefit. Besides, the record shows that in the present case, the manner of enjoying this ore bed had ever been for the owners or lessees of the shares, respectively, to pay a premium per ton, on the first of every year, into a common treasury, which sum was divided among the owners according to the number of shares owned by them, and that *such use and enjoyment of said ore bed was the only and usual use and enjoyment to which it could be put.* It is a convenient time for accounting, and the usual practice, we believe, for joint owners of real estate to reckon the annual rents and profits, at annual periods or times, and this rule is a very fair and reasonable one in reckoning and dividing the rents and profits of ore beds, quarries, fisheries and the like. This question, however, was passed over by the judge in his charge, because, it may be presumed, he could not, according to his view of the law, charge in favor of the defendants; but further, it is not certain that the question necessarily arose in the view of the judge, for if the defendants were bailiffs of certain ore already dug by the plaintiffs, the plaintiffs' claim to that did not, of necessity, depend upon a solution of the question, at what time and in what manner the joint owners of an ore bed should render their accounts for their enjoyment of it in severalty.

It is further claimed that the defendants had already accounted to their lessor, Forbes Munson, for all the ore they had taken and carried away from the plaintiffs' pile of some ten thousand tons, and that they could not be obliged to account for the same a second time. Whether the defendants had paid Forbes Munson any more money than the purchase price they agreed to give him for his right to dig, being one twenty-fourth part, does not appear from the case; this of course, they were bound to pay him; but if they have paid him for more than the one twenty-fourth part entitled him to, they have paid him in their own wrong, for this was all which said Munson owned or claimed to own, and his tenants could acquire nothing more than he had a right to give. The question whether the defendants must account as co-tenants, depends upon the question whether the defendants or Munson were in fact in possession of that one twenty-fourth part. The

plaintiffs were in possession of twenty-three twenty-fourth parts, and if Munson had leased his share to the defendants and they had taken possession of that share, the defendants were co-tenants with the plaintiffs, and Munson was not a co-tenant, and so the defendants were the proper persons and the only persons to be sued. The money which the defendants paid Munson, whether it was a gross sum or so much per ton, was for a different purpose than to pay for common profits which were to be divided among the owners of the ore bed for the year in question according to their respective interests. Everything turned on the question who were in possession—who received the rents and profits that year. So the judge left it to the jury.

There is nothing in the objection that Fenn was a co-tenant of the plaintiffs for 1853, and should have been joined with them in this suit. The judge decided correctly, that if he was, as claimed, a co-tenant in 1853, he must have been joined or the action would fail. So that everything turned on the matter of fact. Was he in possession? The jury found that he was not, and on the facts conceded, they must have so found or a new trial would have been awarded. It appears that in 1842 Fenn had a title as mortgagee to a certain small interest in said ore bed—that the plaintiffs had become the owners or lessees of the equity of redemption of that interest, and as such owners or lessees had for years been in the possession and enjoyment of that interest, and indeed, of the entire ore bed, except in 1853, of the said twenty-fourth part belonging to said Munson. In 1852 Fenn foreclosed his mortgage, but did not take possession of his interest, nor interfere with the plaintiffs' possession and enjoyment. Under the charge, the jury found that in 1853 Fenn was not in possession but that the plaintiffs were, and were exclusively taking the rents and profits. Now, upon these facts, it is impossible to hold that Fenn was a co-tenant in possession; he had a certain legal right, and that is all, and he could neither sue nor be sued on that account.

Nor was the testimony of Fenn's receiving money in January, 1854, for his share of the rent for 1853, in any way objectionable. It is said it was received after the commencement of this action. So it was by Fenn, but not by Mr. Adams,

who professedly acted as his agent in the matter. Adams received it from the plaintiffs in January before the suit was commenced, at which time they paid him as the common treasurer of all the shareholders in this ore bed, the annual rent, as had been the practice for many years before. Besides, the evidence conduced to show the character of Fenn's relation to this property, and that Adams was his agent in leasing or controlling the property.

We advise that the declaration is sufficient and that there be no new trial.

In this opinion the other Judges, STORRS and HINMAN, concurred.

Declaration sufficient. New trial not to be granted.

HUFF ET AL. V. MCDONALD.

(22 Georgia, 131. Supreme Court, 1857.)

Transfer of right of action against co-tenant—Joinder of administrator. The vendee of an undivided interest in land, upon which mining was going on at the time of his purchase, afterward procured an assignment from his vendor of all right of action on account of vendor's share of gold taken out; the court admitted this assignment in an action of account, against a co-tenant, under the objection that it was an assignment of a tort; afterward the administrator of such vendor was made party to the bill: *Held*, that the error, if any, was obviated by amendment.

[1] **Measure of accountability to co-tenant.** If one tenant in common receive more than his just share of the proceeds of gold washings, he is liable to account to his co-tenants for such surplus, and for all the profits which he makes out of such surplus; and if there is proof that he used such surplus, and no proof as to whether he made any profits out of it or not, the presumption is that he made profits out of it, and profits at least equal to the interest on the value of such surplus calculated at the legal rate.

Statute of Limitations—Knowledge of co-tenant. If one tenant in common receive more than his just share of the proceeds of gold washings, the Statute of Limitations does not commence to run in his favor, so as to bar an action of account by the co-tenant, until the tenant begins to hold such surplus adversely to the co-tenant, and knowledge of that fact comes to the co-tenant.

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[1] *McCord* v. *Oakland Q. Co.*, 64 Cal. 134; 49 Am. R. 686.

Gold dust treated as money—Interest. Clean gold taken from washings may be treated as money, and interest allowed on it where wrongfully kept by co-tenant, as upon so much money received.

In equity, from Cass Superior Court. Tried before Judge BROWN, at September Term, 1856.

The bill alleges that complainant, Charles J. McDonald, on the 2d of May, 1843, purchased at a sale made by the Commissioner in Bankruptcy for the State of Georgia, the one undivided quarter of the southeast half of lot No. 210, in the 2d district of Carroll county, sold as the property of John T. Rowland, a bankrupt. That some time in the year 1843, he purchased one other undivided fourth part of said southeast half of said lot, from one Littleton Atkinson, but the deed of conveyance from Atkinson to complainant was not executed and delivered until the 8th of October, 1844, at which time he also conveyed and assigned to complainant all his right, title and interest to all damages for trespasses in digging gold on said lot.

The bill further alleges that in the year 1842, the defendants, Huff and Chambers, entered upon said premises, which contained a valuable gold mine, and engaged extensively in working the same, and continued for some time their mining operations thereon, and dug up and appropriated to their own use, gold amounting to a very large sum; that they also leased or rented to others the right and privilege of mining on said premises, and received large sums as rent for said right and privilege thus to dig gold; that defendants refused to account with and pay to complainant the share which is due and coming to him from said mining operations and from said rents as joint owner or tenant in common of said premises; that he has no means of proving the amount of gold dug, the number of hands engaged and the expenses of the mining operations, except by resorting to the consciences of the defendants. The bill prays for a discovery and account; that the books kept of their transactions may be produced; and that said defendants or either of them, be decreed to pay over to complainant the share or amount found due to him from them or either of them upon such accounting, etc.

The defendants demurred to the bill for want of equity,

and because complainant had adequate remedy at law for the trespasses complained of; and because no assignment of damages for trespasses committed before complainant purchased from Atkinson, could give him a right to a recovery on account of said trespasses; which demurrer was overruled by the court, and defendants excepted.

And answering, they admit that they entered upon said premises about the 1st August, 1842, and continued thereon until about the 25th December, 1843, and did work the mines thereon, and dig up and carry away and appropriate to their own use all the gold found, and they deny complainant's right to any share of the same or to have any account therefor from them; they say that Chambers purchased from one William A. Maxwell, one-fourth part of said south half of said lot, in the year 1842, and obtained from him a bond for titles to the other fourth part of said premises, said bond made by one Benjamin Chapman, but was not assigned in writing to defendant, and under this purchase they entered upon said lot, and engaged in the business of digging gold thereon. They knew that there were other just owners or tenants in common, but they were wholly ignorant of any title or interest of complainant in said premises, and were informed that it was the agreement or understanding of all the owners, that any one could enter upon and dig for gold without liability to the others for rents or otherwise, and with this information, and under this belief, they entered upon said lot and commenced digging, and they did rent to others the privilege of digging. But they deny that they ever obtained $100,000 worth of gold, as charged in complainant's bill, or anything like this amount, or $2,000 for rent; but they affirm, that after working on said premises until about the 25th of December, 1843, they came to a settlement, and the amount of gold they made on said south half of said lot, after paying and deducting therefrom all the necessary expenses, was about $300, and this, without allowing defendant, Chambers, anything for his services in superintending the business, and, if a reasonable sum should be allowed for those services, nothing was made. They are unable to state how much gold was dug, or the number of hands they had employed, —from whom the negroes were all hired; the price paid was about ten dollars per month. The book, in which was kept

the names of the hands hired, the prices paid and the amount of gold dug up to the time they quit their operations and made their settlement, has been lost or mislaid, and this was occasioned by the removal of defendants to places distant from their mining operations. They do not admit the tenancy in common with them of complainant, deny his right to receive any part of the gold dug by them, and hold him to a strict proof of his title, etc.

The case coming on to be heard, after the reading of the bill, answer and replication, the complainant offered in evidence:

1st. A grant from the State of Georgia to John Martin, for lot No. 210, dated 17th June, 1830; deed from Martin to Willis Rabun for the same lot, dated 5th August, 1830; deed from Rabun to John T. Rowland and Littleton Atkinson to south east half of said lot, dated 28th December, 1838; deed from Atkinson to Charles J. McDonald to the one undivided fourth part of the said southeast half, dated the 8th October, 1844, and recorded the 6th April, 1847; also a deed from M. Myers, general or official assignee in bankruptcy for the district of Georgia, to Charles J. McDonald, for the undivided one quarter of the southeast half of the same lot, No. 210, sold as the property of John T. Rowland, dated 2d May, 1843. To the introduction of this last deed counsel for defendants objected, on the ground that no judgment, order or decree authorizing said sale, had been shown or produced. The court overruled the objection, and defendants' counsel excepted.

2d. Complainant then offered in evidence the following instrument of writing, viz.:

"For value received and in consideration of the sum of three hundred dollars to me in hand paid, the receipt whereof is hereby acknowledged, I, Littleton Atkinson, of the county of Macon and State of Georgia, have bargained, sold and assigned, and by these presents do bargain, sell and assign to Charles J. McDonald, of the county of Cobb and said State, all my right, title and interest, both at law and in equity, to damages for trespasses in digging gold on lots of land Nos. 209, 210 and 205, all in the second district of the county of Carroll, with full authority to use my name in the recovery thereof.

"In witness whereof I have hereunto set my hand and seal this eighth day of October, A. D. 1844.

(L. S.) "L. ATKINSON."

Counsel for defendants objected to the introduction of this paper, on the ground that it only authorized complainant to use the name of Atkinson, and he could maintain no action on it in his own name, and the right to bring suit for trespass not being assignable, the same was void, which objections were overruled by the court and the paper admitted and allowed to go to the jury.

3d. Complainant gave in evidence depositions showing that Hull and Chambers had worked the lot for gold, from 1842 to 1844, with about twenty men; had also let out parcels of ground to third parties; that the receipts would average about a pennyweight per day of gold per hand; that after 1844 Hull had worked it on his own account. The evidence as to what amount of gold was dug and what portion was taken from the several lots 208, 209 and 210 was conflicting and uncertain.

The cause being closed, counsel for the defendants requested the court to charge the jury:

1st. That if the plaintiff is entitled to recover anything, he is not entitled to interest.

2d. That the Statute of Limitations commenced to run against the plaintiff whenever he could have instituted suit against the defendants, and that he could have sued the defendants when they quit their joint work, and if he failed to bring his suit within four years from the time they ceased their joint work on said lot, then his right to recover is barred and he can recover nothing.

3d. That the bill being filed against Huff and Chambers for joint work, and no charge being made in it against Huff alone, since he and Chambers ceased their joint operations on said lot, then plaintiff can recover nothing against Huff alone.

All of which the court refused to charge, and counsel for the defendants excepted; and the court charged the jury as follows:

1st. That if the complainant is entitled to recover anything, he is entitled to interest from the time when defendants converted the gold bullion into money, and thereby appropriated it to their own use.

2d. That the parties having, as the court understood them, while conducting the evidence before the jury, admitted themselves to be tenants in common, and the court regarding them as such, the complainant's right of action did not accrue until defendants disavowed complainant's right and he had notice of that fact, and that the Statute of Limitations did not commence to run till complainant's right of action had accrued.

3d. That the bill being filed against the defendants jointly and severally, complainant had a right to recover of them jointly for his proportion of the gold dug by them jointly, from the part of the lot to which he has shown title, and of half separately for his proportion of the gold dug by them separately, after deducting all expenses of procuring the gold in each case. And counsel for the defendants excepted.

The jury returned a verdict for the plaintiff for $3,035.12 with costs against Huff and Chambers, and for $207.17 with costs against Huff.

Defendants' motion for new trial was denied; exception.

W. AKIN, for plaintiffs in error.

J. W. H. UNDERWOOD, for defendant in error.

By the Court, BENNING, J., delivering the opinion.

The first two grounds of the demurrer were not insisted on.

The third, and only remaining ground, had been obviated by an amendment to the bill; an amendment by which the administrator of Atkinson had become a complainant in the bill.

The objection to the admission in evidence of the assignment made by Atkinson, was also obviated by this same amendment.

The first question, therefore, is upon the refusal of the court to charge as requested.

The first request was this: "That if the plaintiff is entitled to recover anything, he is not entitled to recover interest." Was the court's refusal of this request right?

The plaintiff and defendants were tenants in common; tenants in common of a piece of land containing a gold mine.

The defendants alone worked the mine. They received from it a quantity of gold. This gold they used, delivering no part of it to the plaintiffs.

By the 27th section of the act of the 4th of Anne, "for the amendment of the law and the advancement of justice," it is amongst other things declared, that "actions of account may be brought" "by one joint tenant or tenant in common, his executors and administrators, against the other, as *bailiff*, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common." Schley's Dig. 330.

If, therefore, one tenant in common receives more than his just share, he is to hold the surplus above his share, as bailiff, for the other tenant in common, and is as bailiff to account for such surplus to that tenant. This seems to be the meaning of the statute.

Is a bailiff liable to the payment of interest?

"Bailiff or receiver to any man, etc. By this 'etc.' many things are implied; as that by bailiff is understood a servant that hath administration and charge of lands, goods and chattels, to make the best benefit for the owner, against whom an action of account doth lie for the profits which he hath raised or made, or might, by his industry or care, have reasonably raised or made, his reasonable charges and expenses deducted." Co. Litt. 172a.

From this it follows that a bailiff is bound to pay his principal at least the actual profits which he has made out of the property which he holds as bailiff.

A tenant in common who receives more than his share of the profits of the common property, holds the surplus as bailiff for his co-tenant, who, therefore, stands to him as his principal. He, consequently, is bound to pay his co-tenant the actual profits which he has made out of such surplus, as well as the surplus itself. See *Docker* v. *Somes*, 2 Myl. & K. 655; Stor. Eq. 465, 445.

Gold of the purity of that taken from this mine is, for all practical purposes, equivalent to money. The gold, therefore, received by the tenants, Huff and Chambers, may be treated as so much money.

Now, the law, by saying that a particular rate of interest

shall be paid for the use of money, says, in effect, that profits arise from the use of money, and that these profits are to be deemed equal, not only to the interest on the money at that rate, but to such interest plus another sum sufficient to pay the person using the money for his risk, care, trouble and expense in using the money.

The tenants, Huff and Chambers, had the use of the surplus gold, if any, which they received from the mine. They admit that they used all the gold which they received from the mine.

It follows that it is necessary to presume in the absence of proof to the contrary, that they made profits on this surplus gold, and that those profits were at least equal to what would have been the interest on that gold, considering the gold as so much money.

Now, what they were bound to account for was, as we have seen, this surplus gold, and the actual profits which they made on it.

What the court told the jury they were bound to account for, was the surplus gold and the interest on it. This was, in effect, merely making interest on the gold the measure of the profits made on the gold.

Interest, as we have seen, is really in the eye of the law an inadequate measure of the profits of gold or money.

What the court told the jury, therefore, was at least as favorable to them, that is, the tenants, Huff and Chambers, as they had any right to expect.

(1.) The effect of the charge being, then, merely that the jury might consider interest as the measure of profits, and the charge being made in a case in which, by the absence of all proof as to what were the actual profits, there was no other measure of profits—the charge was free from error, at least, so far as Huff and Chambers were concerned.

It follows too, that if the requested charge had been given without explanation, it might have misled the jury. And therefore the court was not bound to give it.

There is nothing in this conclusion adverse to anything contained in the 28th section of the Judiciary Act of 1799, a section which is as follows: "No verdict shall be received on any unliquidated demand where the jury have increased their ver-

dict on account of interest, nor shall interest be given on any open account, in the nature of damages."

It was never supposed that there was anything in this section to prevent a *cestui que trust* from recovering from his trustee the actual profits, no odds how great, made by the trustee out of the trust property. Executors and administrators have had to account for the actual profits made by them out of the assets in their hands, be those profits as high as they might, just in the same way, and to the same extent, since the passage of the act containing this section as before its passage. And so it has been with all other like trustees. And a bailiff is, as we have seen, a servant or trustee like to these.

The next question relates to the Statute of Limitations and grows out of the charge on that subject refused, and the charge on that subject given.

At what time did the Statute of Limitations commence running against the plaintiff?

The defendants, Huff and Chambers, as we have seen, received and held the surplus gold as bailiffs for the plaintiff; as bailiffs having the "administration and charge" of the gold for the "benefit" of the plaintiff. In other words, the defendants were trustees of the gold for the plaintiff; trustees entitled, at least, to the right, if not subject to the duty of administering, *i. e.*, managing and using the gold for the benefit of the plaintiff.

This being so, there was the same sort of relation between them and the plaintiff that there is beween an executor and the legatees, an administrator and the next of kin, a guardian and the ward. But the relation between these is such that it prevents the Statute of Limitations from running until the executor, the administrator, or the guardian, as the case may be, has begun to hold adversely to his correlative, and knowledge of that fact has come to the correlative.

(2.) It follows, that the relation between this plaintiff of the one part and the defendants of the other, was such as to prevent the statute from beginning to run in favor of the latter against the former, until the latter began to hold the gold adversely to the former, and knowledge of that fact came to the former.

It is true, that in a case in the 4th of Iredell's Eq. Rep. 1, the court comes to a different conclusion; but the court cites

no authority for its opinion, and besides, seems not to have adverted to this peculiarity of the relation which, under the statute of Anne, exists between the tenant in common receiving more than his just share, and his co-tenant.

We think, then, that the court below committed no error with regard to the Statute of Limitations.

The bill prays for an account against the defendants separately, as well as jointly.

The court was right, therefore, in refusing the third charge requested, and in giving the third charge given.

The evidence was conflicting; but we think that there was at least as much in favor of the verdict, as against it.

The result is that the exceptions must all be overruled and the decisions excepted to, be affirmed.

Judgment affirmed.

EARLY ET UX v. FRIEND ET AL.

(16 Grattan, 21; 78 Am. Dec. 649. Court of Appeals of Virginia, 1860.)

Action between tenants in common, for account. One tenant in common may maintain a suit in equity against his co-tenant who has occupied the whole of the common property for an account of rents and profits.

Property occupied exclusively by one of the co-tenants. Whenever the nature of the property is such as not to admit of its use and occupation by several and it is used and occupied by one only of the tenants in common, or when the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion within the meaning of the statute.

Co-tenants unwilling to adventure the risks have no right to claim any share in the profits. They are entitled only to their proportion of a fair rental value of the premises.

[1] **Rental value, the measure of accounting.** Where the common property (salt works) is rented out by one tenant in common he is accountable to his co-tenants for their share of the rents he has received, and where he occupies and uses the whole property himself he is liable for a reasonable rent for it in the condition it was in when he took possession.

Interest is to be paid upon the rents found to be due from the tenant in common in possession to his co-tenants.

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[1] *Edsall* v. *Merrill*, 37 N. J. Eq. 114; *Allen* v. *Barkley*, 14 M. R. 243.

This was a bill filed in March, 1848, in the Circuit Court of Kanawha County, by Richard K. Cralle against Joseph and Thomas R. Friend, Samuel H. Early and wife, and others, asking for an account of the rents, issues and profits of a certain salt property and a tract of land in the county of Kanawha, which the Friends owned as tenants in common with the plaintiff and the other defendants, and of which the Friends had held exclusive possession. The record is very voluminous, but the facts necessary to show the points decided by the court are as follows:

Dr. John J. Cabell died in 1834, leaving a large real estate in the city of Lynchburg, and in the counties of Bedford and Kanawha. In the county of Kanawha he owned a valuable salt property, and a tract of land. The persons entitled to share his estate, were his widow and five children, viz.: Mrs. Cralle, wife of Richard K. Cralle; Mrs. Ward, wife of Henry C. Ward; Mrs. Friend, wife of Thomas R. Friend; Paulina Cabell, and Henry Ann Cabell, who afterward married Samuel H. Early. Thomas R. Friend qualified as administrator on the estate.

In November, 1834, a friendly bill was filed in the Hustings Court of Lynchburg, by the widow and heirs of John J. Cabell, for a division of his estate; and on the same day commissioners were appointed to make the division.

Prior to October, 1835, Henry C. Ward had died, Paulina Cabell had died an infant, intestate and unmarried, and Mrs. Cralle had died, leaving an infant daughter, Mary C. Cralle; and in October of that year these deaths were suggested, and Mary C. Cralle was made a party plaintiff. The court set aside the former order appointing commissioners to divide the estate, and at the same time re-appointed them, with directions to assign the widow her dower, and to divide the property among the four surviving heirs, Mary C. Cralle being substituted for her mother.

The commissioners divided the property in Lynchburg, allotting to the widow her third, and to each of the heirs her fourth in severalty; but in relation to the salt property on the Kanawha they say "That a portion of Dr. Cabell's real estate, to wit, the salt works and furnace on the Kanawha, do not seem to them capable of division; and as they are now of

great value, and as their present value may hereafter be still more increased or diminished, according to a variety of circumstances, they have felt it their duty to give to each party a certain designated interest therein, so that each may be alike profited by an advancement of its value, or suffer equally from any further depreciation." And the property having been valued at $25,000, to Mrs. Cabell, the widow, was allotted one third for her dower, at $8,333.34, and to each of the four surviving heirs was allotted one fourth of the remainder at $4,166.66. And the tract of land on the Kanawha was allotted to the four heirs, each one undivided fourth thereof, valued at $3,750.

The commissioners having made their report, the parties seem to have taken possession of the real estate allotted to them in severalty; and nothing more was done in the case until November, 1845, when the report was directed to lie one month for exceptions; and no further proceedings appear to have been taken in the cause.

By deed, bearing date the 19th December, 1835, Mrs. Cabell, the widow of Dr. Cabell, acting for herself and as guardian of her daughter, Henry Ann Cabell, leased to Thomas R. Friend her third of the said salt property, and Henry Ann Cabell's one fourth of the remaining two thirds thereof, for ten years, commencing on the 25th of December, 1836. For the widow's third he was to pay $500 a year, and for Henry Ann Cabell's interest he was to pay $300 a year. And it was agreed that if the widow died before the end of the ten years, the lease as to her part was to cease; and if Henry Ann Cabell attained to the age of twenty-one years, or married before the ten years expired, upon the happening of either of these contingencies the lease as to her interest was to cease; or if it continued thereafter, it was to be at the pleasure of the said Henry Ann if she attained the age of twenty-one years, or of her husband if she should marry before the time expired.

By another deed of the same date, Mrs. Ward, for the consideration of $8,750, conveyed to Thomas R. Friend her fourth in the two thirds of the said salt property, her fourth in the third thereof allotted to Mrs. Cabell for life, and her fourth of the tract of land on the Kanawha.

Thomas R. Friend having thus acquired the interest of Mrs. Cabell, Henry Ann Cabell and Mrs. Ward, and being entitled

to another fourth in right of his wife, took possession of the said salt property, and he and his father, Joseph Friend, worked it in partnership until 1842.

In January of that year Thomas R. Friend conveyed all his interest in the property to Joseph Friend, who continued to work the property on his own account from that time. When they took possession the property was very much out of repair, and whilst it was occupied by them very expensive improvements were made upon it, by which the issues and profits of the property were greatly increased.

It appears that Mrs. Cabell lived until some time in the year 1843. In the same year Henry Ann Cabell attained the age of twenty-one years; and in 1846 she married Samuel H. Early, a marriage settlement having been previously executed whereby her property was conveyed to Jubal A. Early, in trust for her separate use. It appears too, that the rent due to Mrs. Cabell was paid, as was that due to Henry Ann Cabell up to 1843, a part of it having been paid to Early after the marriage. And Joseph Friend, in his answer, avers that neither Henry Ann Cabell, after she came of age, nor her husband, after the marriage, ever expressed any wish to change the terms of his holding under the lease aforesaid; "and hence he has always hitherto regarded himself as holding and occupying under the original rent reserved." It also appears that the plaintiff Cralle had received from Hewitt, Ruffner & Co. $500 a year as dead rent for his interest as tenant by the curtesy in the property up to the year 1841.

Before the bill was filed in this case, Mrs. Ward and Mrs. Thomas R. Friend had died, the latter leaving four infant children surviving her, who were parties defendants in this suit.

In 1848 the court directed accounts of the rents, issues and profits of the salt property and the tract of land on the Kanawha, whilst in the possession of the Friends, to be taken; one of these accounts was to commence when they took possession and be continued until the 28th of January, 1842, when Thomas R. Friend conveyed his interest in the property to Joseph, and was to be charged to them jointly, and another was to extend from that period until the first day of the next term of the court and was to be charged to Joseph Friend.

The commissioner returned his report, which was excepted to by all the parties; and the cause came to be heard on the 22d of February, 1853, when the court made a decree, which was changed in some respects by another decree made on the 17th of February, 1855. By these decrees the court held that the co-tenants of the Friends were entitled to share in the actual profits made on the salt property, according to their several interests, and to recover from the Friends their share of the net profits which had been received by them, except for such time as the shares of any of the parties were actually rented, or for which they had theretofore received compensation, and having determined the interests of the different parties in the profits, and fixed the time from which they were each entitled to share them, and having also fixed the nature of allowances which should be made to the Friends, and deciding that they were not to be charged with interest upon the annual profits, the report was re-committed, with instructions to the commissioner to re-state and settle the account upon the evidence then in the record, or which might be produced.

From this decree Samuel H. Early and wife, and the trustee, Jubal A. Early, applied for an appeal, which was allowed.

The case was most elaborately argued in printed notes, upon all the questions raised in it, by BEVERLY R. JOHNSTON and PRICE, for the appellants, and CONWAY, ROBINSON and FRY, for the appellees, Thomas R. and Joseph Friend; but the decision of the court involves but two of these questions.

MONCURE, J.

The first question to be disposed of in this case is one of jurisdiction, which was raised in the argument before this court. It was not raised by any of the defendants in the court below by plea, answer or otherwise, so far as the record shows, but on the contrary, the answers of the principal defendants, in effect, admitted the jurisdiction of the court. The only notice which seems to have been taken of the subject in that court is contained in the decree of the 22d day of February, 1853, in which an opinion is expressed by the court that it had jurisdiction of the case upon the principles declared by the Court of Appeals in the case of *Ruffners*

v. *Lewis*, 7 Leigh, 720. If the defendants, Joseph and Thomas R. Friend, are bound to account with the plaintiff and their other co-tenants in common for rents and profits of the common property, while it was solely occupied and enjoyed by the Friends, as claimed by the bill, then, undoubtedly, a court of equity has jurisdiction of the case. It involves the settlement of an account of rents and profits in which, according to that supposition, the plaintiff and defendants have a common interest in different proportions, and some of the parties concerned are infants. I will, therefore, proceed to consider the case upon its merits. The appellees, the Friends, by their counsel, contend that they are not bound to account at all for such rents and profits to their co-tenants in common, at least to such of them as were adults when the property was occupied and enjoyed as aforesaid; and that therefore, the bill ought to have been dismissed. They insist that as tenants in common they had a right to occupy and use any part, or all of the common property, without being accountable in any form or to any extent, to their co-tenants, unless they contracted with them for such accountability or ousted or excluded them from the possession, or unless they destroyed or wasted the common property; none of which they say did they do. This would certainly have been the case at common law. "If one joint tenant, or tenant in common of land," says Coke, "maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But, although one tenant in common, or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before; which he can not do in this case, unless his companion constitute him his bailiff; and, therefore, all those books which affirm that an action of account lieth by one tenant in common or joint tenant against another, must be intended, when one maketh the other his bailiff; for otherwise, never his bailiff to render an account—is a good plea." 1 Tho. Co. 787, marg. And in a note by the editor it is said: "At common law joint tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, since he could not be charged as bailiff or receiver to his companion, unless he actually made him so." Id. 788, note "R."

But the statute, 4 Anne, c. 16, § 27, was passed in England to remedy this defect of the common law. And a similar statute was passed in this country at an early period, and has ever since continued in force. In the Code, p. 586, Ch. 145, § 14. It is in these words:

"An action of account may be maintained against the personal representative of any guardian, bailiff or receiver, and also by one joint tenant or tenant in common, or his personal representative, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common."

But it is contended that this statute makes a joint tenant or tenant in common liable to account to his co-tenants only where he receives money, or something else given or paid by another, which all the tenants are entitled to in proportion to their interests as such, of which one receives more than his just share according to that proportion; and not where he merely has the sole occupation and enjoyment of the property, even though, by the employment of his own industry, skill and capital, he makes a profit by such occupation and enjoyment, and takes the whole profit to his own use; and that therefore the Friends, not having received any rent from others for which they are accountable, but having only occupied and enjoyed the property as aforesaid, are not liable to account to their co-tenants for any profits which may have been made by such occupation and enjoyment, nor for any rent or other compensation whatever. In support of this position a very important case decided in 1851, in the Exchequer Chamber, *Henderson* v. *Eason*, 17 Q. B. 701, is cited, and much relied on by the counsel of the Friends; and it must be admitted that it fully sustains their position, and, if it were a binding authority, might be conclusive of this case. The question came fairly up for decision in that case. It was an action of account founded on the Stat. 4 Anne, c. 16, by Robert Eason against the executor of his co-tenant in common, Edward Eason; the pleadings were in proper form. On the trial of the issues evidence was given that the two Easons were tenants in common of a farm from November, 1833, to November, 1838, during which time Edward Eason occupied the whole on his own account; that he

cultivated the same on his own account solely, and appropriated the produce to his own use; that he cropped the farm in the usual way, kept the usual quantity of live and dead stock, and farmed well; and that he received all the produce of the farm, and sold it on his own account. Verdict was found for the plaintiff, and upon an account thereafter taken the sum of £900 was found to be due to him, for which judgment was accordingly rendered. The case was brought by error from the Queen's Bench to the Exchequer Chamber, where it was fully and ably argued. Parke, B., in delivering the judgment of the court, lays great stress on the word "receiving" in the statute. "Every case," he says, "in which a tenant in common *receives* more than his share is within the statute, and account will lie when he does receive, but not otherwise. He is to account when he *receives*, not *takes*, more than comes to his just share. What, then, is a '*receiving*' of more than comes to his just share, within the meaning of that provision in the statute of Anne? It appears to us that, construing the act according to the ordinary meaning of the words, this provision of the statute was meant to apply only to cases where the tenant in common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion. The statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole, or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share, and he becomes, as to that excess, the bailiff of the other, and must account. But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject or made more by its occupation, than the other, we have insuperable difficulties to encounter." The learned judge proceeds to enumerate these difficulties, and concludes by reversing the

judgment of the Queen's Bench. See Rob. Prac., 173 (New Ed.), where this case is fully stated, and other cases on the subject are referred to.

This decision certainly settles the construction of the statute in England. But it is somewhat remarkable that its construction had not there been settled long before. And it would seem that until that decision was made, the current, or at least the preponderance, of judicial opinion in that country was the other way. That was the opinion of Vice Chancellor Wigram in *McMahon* v. *Burchell*, 3 Hare, 97, decided in 1843, though afterward reversed by Lord Chancellor Cottenham, [2 Phill. 127, 22 Eng. Ch. R.,] upon the ground that mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants, and that the nature of the occupation in that case did not amount to such exclusion. That was the opinion, also, of Vice Chancellor Shadwell in *Henderson* v. *Eason*, 15 Simons, 303, decided in 1846; though Lord Cottenham doubted on appeal whether the claim allowed by the V. C. could be maintained, and directed an action to be brought: 2 Phill. 308. And that was also the opinion of the court of Queen's Bench in *Eason* v. *Henderson*, 12 Q. B. 986, decided in 1848, on a case stated for the opinion of the court by order of a judge after issue joined in an action brought by direction of the Lord Chancellor as aforesaid. Lord Denman, C. J., in delivering the opinion of the court said: "The case stated that he (the defendant) had occupied and received the whole profits, but no part was underlet; he received no rent, nor anything but the profits derived from the culture of the lands, to the expense of which the plaintiff in no way contributed. It was contended that the defendant was not liable as bailiff, because it appeared that he had not received *rent*, and because it did not appear that he had received more than his just proportion. But we think that the words, 'rents, issues and profits,' include the proceeds of the land, whether in money or in kind, etc." The Lord Chancellor it appears, being dissatisfied with that proceeding for some cause directed another, action to be brought, which was accordingly brought, and was finally decided in the court of Exchequer Chamber, as before mentioned.

If the decision of that court, instead of being made in 1851, had been made before the statute of 4 Anne, c. 16, S. 27, was adopted by us, the construction which that decision settles in England would have been adopted by implication along with the statute. But as at the time of the adoption of the statute by us there had been no English decision construing it, we are left free to construe it according to its apparent meaning and the probable intention of the legislature, without being controlled by subsequent decisions in England or elsewhere, other than in our own State, though certainly we will always pay due respect to decisions out of our State, and none are entitled to more respect than those of the English courts, and especially the court of Exchequer Chamber.

What, then, is the meaning of the words in our statute, "for receiving more than comes to his just share or proportion?" What did the legislature intend by the use of those words? Did they only intend to make a tenant in common accountable to his co-tenants for receiving from a stranger, on account of rents and profits of the property, more than the just share or proportion of such tenant? Or did they intend to make him accountable for receiving more than his just share or proportion of the rents and profits, whether paid by a stranger or derived from his own occupation and enjoyment of the property? I think they intended the latter. The former construction may be a reasonable one in England, where the ordinary mode of deriving profit from real estate is by renting it out, but not in this State, where real estate is generally occupied and used by the owner. With all deference to the court of Exchequer Chamber, I think the construction they put upon the word "receiving" is too technical and narrow, at least for our country; and if it be a just one in England, it is because of circumstances existing there which do not exist here. I do not see the force of the distinction drawn by that court between the words "receive" and "take" in this connection. I think the word "receiving" in the statute literally means a receiving of profits as well by use and occupation as by renting out the property. At all events, there is, in substance, no difference between them, and the former is as much within the reason and the meaning of the law as the latter. If a tenant in common rent out the property and receive more than his just share of the rent, he

is accountable for the excess to his co-tenants. Why should he not be alike accountable when, instead of renting out the property, he solely occupies and uses it, and thus receives more than his just share of the profits? Why should he be told "if you rent out the property and receive the rent, you must share it with your co-tenants; but if you solely occupy and use it and take all the profits, you will not be accountable to them?" Would he hesitate between these alternatives?

I think the same principle precisely applies to the two cases. And the only difficulty which exists is in the application of the principle to one of the cases. That difficulty was much commented on by the court in the case decided by the Exchequer Chamber, and was one of the causes, if not the chief cause, of that decision. In the case of rent received from a stranger, "there is no difficulty," the court said, "in ascertaining the share of each and determining when one has received more than his just share." But in the case in which one has enjoyed more of the benefit of the subject, or made more by its occupation than the other, "we have insuperable difficulties to encounter." The court then proceeded to enumerate the difficulties.

I readily admit the existence of difficulty, but not that it is insuperable; certainly not in all cases. It consists in the fact that the occupying tenant has rights as well as his co-tenants, which two classes of rights must, if possible, be reconciled. The statute was not designed to take away or impair the rights of the occupying tenant, but to require them to be so used as not to interfere with those of his co-tenants. Each tenant has a right to occupy and use the common property, but not to the exclusion of his co-tenants. The occupation of one does not necessarily exclude the occupation of the others. They can not, by remaining out, make the occupying tenant their bailiff against his will. He can be made their bailiff only by contract with them, or, under the statute, by receiving more than comes to his just share or proportion. It is often difficult to determine when, by mere occupation and use of the property, he receives more than his just share. And it is still more difficult to lay down any general rule on the subject. *This* rule, at least, may be laid down: that whenever the nature of the property is such as not to admit of its use and

occupation by several, and it is used and occupied by one only of the tenants in common, or wherever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share or proportion in the meaning of the statute and is accountable to the others.

The rule is of easy application in this case, and is, I think, sufficient for its solution. The salt property of which the rents and profits are the subject of controversy here, if capable of use and occupation by several, which is at least extremely doubtful, has certainly been so used and occupied by the Friends, as in effect to exclude their co-tenants therefrom. The Friends have solely occupied and used it and derived all the benefit which they could have derived from it had they been the sole owners. And they so occupied and used it as plainly to indicate that they considered themselves, and must have been considered by the other parties concerned, as renters of the property and not as tenants in common merely. They actually held the dower interest of Mrs. Cabell, being one undivided third of the property, and the interest of Mrs. Early, being one undivided fourth of the other two thirds, under a lease for ten years, dated the 19th day of December, 1835, at a certain annual rate for each interest. These interests with others which they owned, made them proprietors of almost the entire subject. After the determination of the lease they continued to occupy and use the property as before. Indeed, they never, until recently, denied their accountability to their co-tenants in some form or to some extent, for a participation in the rents and profits, but seem to have admitted their liability to Early and wife, or her trustee, for the same annual rent of her interest after she became of age, as before, on the ground that they continued to hold that interest under an implied contract, on the terms prescribed by the expired lease; and to the proprietors of the other outstanding interests for the yearly value thereof, in the condition in which the property was when it came into the hands of the Friends. They only denied the right of their co-tenants to participate in issues and profits which may have arisen alone from their labor, skill and capital in the use of the property, without being accountable for the losses of the operation.

The construction of the statute for which I contend is, I

think, the same which has always been acted upon in this State. It was acted upon without question in the only case on this subject decided by this court; I mean *Ruffners* v. *Lewis' Ex'rs*, 7 Leigh, 720, which was argued by counsel of great experience and ability. The question in that case was, not whether the defendants were liable at all, but on what principle and to what extent. Carr, J., said: "The Ruffners must be treated as tenants in common with Prior, not as trespassers. They are liable for a fair share of the profits, and entitled to full compensation for their expenses fairly and reasonably incurred, as well those attending their abortive efforts to find water, as their more fortunate ones." The opinion of Tucker, P., was to the same effect, and the other judges concurred therein.

The same construction has also been adopted and well established in South Carolina. In *Thompson* v. *Bostick*, 1 McMullan's Eq. 75, before Chancellor Harper in 1830, the defendants, who were tenants in common with the plaintiffs, of a tract of land, had taken possession of it and cultivated all the cleared land.

They also cleared and cultivated another portion of the land and made improvements, and the question was, whether and to what extent they were chargeable. "I am of opinion," said the chancellor, "that defendants ought to be charged with the rent of land estimated as it was when they took possession of it, and are not to be charged with the rent of the newly cleared land or credited for improvements. There is nothing, I think, in the objection that the defendants did not receive rent, but cultivated the lands themselves. To cultivate and have the use of lands is to receive the rents and profits, though the occupier is his own tenant." This decision (at least as to the rents and profits of the cleared land, the other part of the decree not having been appealed from) was afterwards affirmed on appeal. In *Holt* v. *Robertson*, Id. 475, before Chancellor DeSaussure, in 1831, and afterward in the Court of Appeals, the decision was to the same effect. And so also was it in *Hancock* v. *Day*, Id. 69, decided by the Court of Appeals in 1840.

The case of *Sargent* v. *Parsons*, 12 Mass. 149, decided in 1815, was cited and much relied on as being to the same effect with the decision of the Exchequer Chamber before referred

to. But the action in that case was a common law action of account, and not an action upon the statute 4 Anne, c. 16; and most of the remarks of Parker, C. J., refer to the common law, and not the statute. The property, in that case, consisted of houses, lands and wharves, and though they were for a period in the sole possession and occupancy of the defendants, it does not appear that their occupation of the property was of such a nature as to exclude their co-tenants therefrom. In a note to that case it is stated, "That it does not seem to be necessary that the defendant should have received profits otherwise than by his occupancy, in order to give a cause of action to the plaintiff upon the statute. It is sufficient, if he have in any way received more of the issues or profits than comes to his just share and proportion;" for which is cited Dane's Ab. Ch. 8, Art. 3, § 13.

I therefore think the Friends are accountable for rents and profits to their co-tenants in common, and the question next to be considered is, in what manner and to what extent are they so accountable? Are they accountable for issues and profits actually made by the application of their labor and skill and capital to the property, or are they accountable for the fair yearly value of the property in the condition in which it was at the time it came to their possession?

I think the latter is the just and true measure of accountability, and one that is perfectly consistent with the statute.

There is a very material difference between the nature of a liability of a bailiff at common law, and of a tenant in common who is a bailiff under the statute. The former is a fiduciary, bound to manage the estate to the best advantage and make all the profit he can for the owners, and to keep and render to them a full and fair account of his transactions; and he is liable, not only for rents and profits actually received, but also for such as might have been received without his default; while the latter is accountable only for rents and profits actually received, more than his just share and proportion. He is bailiff only by virtue of his receiving more than his just share, and in an action of account against him, it is an essential averment of the declaration that he has received more than his share: *Wheeler* v. *Horne*, Willes, 208; *Sturton* v. *Richardson*, 13 M. & W. 17. He is not a fiduciary nor a trespasser,

but has a right to occupy and use the property. When he rents it out and receives the rent, there is no difficulty in ascertaining the amount for which he is accountable; when, instead of renting it out, he occupies and uses the whole to the exclusion of his co-tenants, and thus, in effect, becomes himself the renter, there is more difficulty. But it seems to me that the just rule is, to charge him with a reasonable rent for the use and occupation of the property in the condition in which it was when he received it, and to hold him accountable to his co-tenants for their just shares of such rent. This rule does justice to all parties concerned and gives the same just measure of compensation to the co-tenants whether the property be rented out by one of them, or be occupied and used by him to the exclusion of the rest. It does not make the compensation in the latter case depend upon the accident of his being a good or a bad manager, a prudent and cautious person or a wild and reckless speculator. It is just to the occupying tenant, who, having occupied and used the property instead of renting it out, ought to be accountable to the same extent as if he had rented it out and received the rent. It is just to his co-tenants, who are entitled to a share of the rent of the property, but not of the issues and profits of his labor, skill and capital applied to its use. They do not share in the *risk* and ought not to share in the *profit* of the operation.

The rule is not inconsistent with any authority that I have seen.

In *Ruffners* v. *Lewis' Ex'ors*, *supra*, an account was taken of rents, profits, etc., but no question was raised in that case as to the correct mode of adjustment, and the one adopted may have been more favorable to the occupying tenant, than to have charged him with a rent; especially, as he was allowed by the express terms of the decree, not only for permanent improvements and for his expenses and actual services in his successful operations, but also for his expenses, labor and services in the course of his unsuccessful experiments. In *Thompson* v. *Bostick*, *supra*, the rule in question was adopted. "If the whole estate," said Chancellor Harper, "were let to tenants, and certain rents reserved, as is commonly the case in England, there would be little difficulty. But what rule shall be adopted when one tenant in common has occupied part of

the premises himself? I know of no other than to estimate the rent of the whole premises, and then to value the rent of that portion of the premises occupied by the tenant in possession, with reference to the condition they were in at the time he took possession." 1 McMullen's Eq. 77.

There may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common, and that was, perhaps, the case in *Ruffners* v. *Lewis*, but such cases would merely be exceptions to the rule I have laid down, which, I think, is properly applicable to most, if not all cases.

It applies, I think, with peculiar propriety to this case, in which the occupying tenants, the Friends, had themselves a large interest in the subject as tenants in common and were lessees (or one of them, at least, a lessee) of other large interests therein of other tenants in common, and embarked, and were for many years engaged in a most hazardous operation upon the property, requiring for its successful result, the expenditure of a vast amount of labor and of capital, and the exercise of the greatest skill and prudence. During all this period the proprietors of the outstanding interests stood aloof, and did not offer to join in the adventure, to contribute to the means of its prosecution, to run the risk of its failure and take the chances of its successful issue. They can not now come forward and say the operation has been successful and they are entitled to a share of the profits. The most they are entitled to is their share of a reasonable rent. The Friends are accountable for that. Being themselves proprietors of some and lessees of other interests in the subject, and occupying and using the whole of it, it is just and right, and what they must have expected and intended, that they should pay a reasonable rent for the outstanding interests. But upon no principle of justice are they bound to account for issues and profits. Nor could such an account now be settled so as even to approach a correct result. It is no easy matter to keep an account of transactions so extensive and running through so long a series of years, and be prepared with proper vouchers for a settlement—and the Friends were under no obligation to do so. Then they are accountable only for a reasonable rent, and the next question is, how is the amount of such rent to be ascertained? In

regard to the appellants, I think, there can be no difficulty. Mrs. Early's interest of one-fourth of two-thirds of the property was leased by her guardian to Thomas R. Friend, at an annual rent of three hundred dollars for a term of ten years, subject to be determined after her arrival at age or marriage, at the election of her or her husband. She arrived at age in 1843 and married in 1846, but, as it is averred in the answer of Joseph Friend, and not disproved nor denied, neither she nor her husband has "ever expressed any wish to change the terms of respondent, holding under the lease aforesaid, and hence he has always hitherto regarded himself as holding and occupying under the original rent reserved."

The lease commenced December 25, 1836, and of course expired, if not determined before by election as aforesaid, December 25, 1846. There was no such election to determine it before, and therefore, by its terms, it continued in force until the last mentioned day; and Joseph Friend having after that day continued to hold and use the property as before, without any objection on the part of Early and wife or her trustee, he might be considered holding on the terms of the previous lease, according to the authorities cited by his counsel, to wit: 2 Rob. Prac. 378-9 (new Ed.); *Hyatt* v. *Griffiths*, 79 Eng. C. L. R. 505; *Humphreys* v. *Franks*, 36 Eng. L. & E. 429.

In *McKay* v. *Mumford*, 10 Wend. 351, it was held that the presumption of law that a tenant who holds over after the expiration of his lease continues to hold under the landlord and on the terms of the lease, does not apply to a tenant in common who leases the undivided interest of his co-tenant. "The fact of his not leaving possession," said the court, "does not authorize the inference that he still intends to hold under the lease; on the contrary, the presumption is that he holds under his own title, which gives him a right to the possession and enjoyment of the whole estate, liable, however, to account to his co-tenants at law (1 R. S. 90) or in equity (8 Cow. 304). This presumption of possession by virtue of his own title may undoubtedly be rebutted, and then he would hold, as to the moiety of his co-tenant, as any other tenant and subject to the same rules of law." If there be any such presumption, it is rebutted in this case by the express admission of Joseph Friend that after the expiration of the lease "he always regarded

himself as holding and occupying under the original rent reserved." I therefore think that the rent for the interest of Mrs. Early, during the whole period of the use and occupation of the property by the Friends, ought to be at the rate paid by the lease.

In regard to the proprietors of the other outstanding interests there may be more difficulty. But I think it ought to be presumed, as to them, that the rent agreed to be paid to Mrs. Early, that is, three hundred dollars, was a fair and reasonable rent for her interest of one fourth of two thirds; which would make the annual rent of the whole property, while in the use and occupation of the Friends, eighteen hundred dollars; and that they ought to be charged with rent at that rate, unless it be proved that a reasonable rent would be more, in which case they ought to be charged with such reasonable rent. I think the Friends ought to pay at least the same rate of rent for the other outstanding interests as for that of Mrs. Early. They derived the same benefit, in proportion, from those interests as from hers; and the fact that they made no contract for the use of the former is certainly no reason for paying less rent for them than for the latter. They must have expected and intended to pay the same rate of rent to all the other parties interested in the property with themselves as they agreed to pay for the interest of Mrs. Early, except the dower interest, for which an annual rent of five hundred dollars was agreed to be paid. Why less rent in proportion was agreed to be paid for the dower interest than for that of Mrs. Early, does not appear. It may have been because the former interest was determinable at any time by the death of the doweress, while the latter was more permanent. At all events, I think, the agreed rent of the latter is a fairer criterion than that of the former for the ascertainment of the amount of rent to be paid for the other outstanding interests. I think the proprietors of those interests, having made no contract with the Friends or either of them, ought to have the liberty of showing, if they can, especially as most of them were infants during the use and occupation of the property by the Friends, that it was reasonably worth more rent in proportion than what was agreed to be paid for the interest of Mrs. Early.

The Friends being accountable to their co-tenants for a rea-

sonable rent of the property, and not for the issues and profits of their operations thereon, ought to pay interest on the rent of each year from the end of such year until payment.

Upon the whole, I think that so much of the decrees of the circuit court as is in conflict with the foregoing opinion is erroneous and ought to be reversed, with costs to the appellees, the Friends, as the parties substantially prevailing, and the cause remanded to the circuit court to be proceeded in to a final decree, according to the principles above declared.

The other judges concurred in the opinion of MONCURE, J.

Decrees reversed in favor of the appellees.

CLEGG v. CLEGG ET AL.

(3 Giffard, 322. High Court of Chancery, 1861.)

[1] **Shaft to get the common minerals, opening on separate estate.** The owners of contiguous estates who were tenants in common of the mines beneath, *held*, equally entitled to the landing rent paid on foreign coal, raised through a shaft which had been constructed by a lessee of the mines held in common, but which opened at surface on land which was the separate estate of one of the owners.

Expenditures made by a tenant, enure to the benefit of all the lessors; it is not the individual outlay of the tenant but accrues to the common benefit of the associate in the common purpose under which the tenant worked.

Costs disallowed to both parties on account of piling up a mass of testimony resulting in failure to prove the respective allegations on account of which it was called.

This bill was filed by Assheton Clegg against Abraham Clegg, Alice Clegg and Thomas Butterworth, and its most material prayer was for an accounting of the rents received for coal raised from adjoining mines owned by strangers, not connected in title with either the sole tenant on whose land the shaft in controversy was sunk, or the tenants in common whose coal it pierced.

It also prayed for an inspection, a receiver, etc.

It appeared that the plaintiff and defendants were tenants

[1] *Pringle* v. *Taylor*, 2 M. R. 458; *Freck* v. *Blakiston*, 83 Pa. St. 474; *Clark* v. *Jones*, 14 M. R. 342.

in common of extensive coal mines, for the working of which some years before suit brought, a deep shaft had been sunk by a tenant of the mine owners which shaft had for a long time been used in working the mines, owned in common, but which opened upon the surface of a certain close owned by the defendants alone.

The contest was concerning the right of plaintiff to share in the landing rent paid by the owners of foreign mines, whose coal was brought to surface through the shaft in controversy.

Certain agreements alleged in plaintiff's bill and upon which he partly relied, as also certain other agreements set up by defendants, were not proved to the satisfaction of the chancellor and are not, therefore, considered in his opinion.

Mr. MALINS and Mr. LITTLE appeared for the plaintiff, and contended that the plaintiff was entitled to participate in the landing rent.

Mr. BACON and Mr. OSBORNE appeared for Abraham Clegg, and cited the case of *The Earl of Cardigan* v. *Armitage*, 2 B. & C. 197–207, and *Bowser* v. *Maclean*, 2 DeGex, F. & J. 415.

Mr. GREEN and Mr. G. L. RUSSELL, for the defendant, Butterworth.

Mr. TAYLOR appeared for Alice Clegg, an infant.

The arguments on both occasions lasted several days, and turned mainly on the validity of the agreements mentioned in the pleadings, none of which in the result were held proved. There was an immense mass of evidence.

THE VICE-CHANCELLOR.

This case has been embarrassed and confused by a mass of evidence which affords very little assistance for the decision of what is the real question between the parties. So far as the plaintiff's bill is filed for the specific performance of the alleged agreement of November, 1846, his case has entirely failed. He has not shown, as to the landing rent derived

from the landing of foreign coal, that there was any concluded agreement in the month of November, 1846, according to the memorandum which he states. As to the agreement which is set up by the defendants, Abraham Clegg and Butterworth, as a parol agreement, said to have been made in the month of October, 1846, so far as any such parol agreement relates to this question of landing rent for foreign coal, the case fails as completely as it does as to the other. Therefore, the court is bound, I think, to consider the extent to which the litigation has gone, and to make a declaration to that effect by its decree.

The great question in dispute is the right of the plaintiff to participate in the profits derived from landing coals of other coal owners through the shaft sunk on the defendant's land. That shaft was sunk for the purpose of working those beds of coal, of which both the plaintiff and the defendant are tenants in common in undivided moieties. The plaintiff insists on a right of property in this shaft, sufficient to entitle him to participate in any profit made by the use of it and the works connected with it, for the landing and raising of coal of other coal owners. The defendant, on the other hand, insists that this is a shaft which pierces his ground—is made upon ground which is his separate property, as to the surface of the ground and as to everything connected with it, except the beds of coal, and that it is his separate property, of which he is tenant in severalty in fee simple. When I speak of the defendant Abraham Clegg, I wish to be understood as speaking of that interest which he has as tenant in common with Alice Clegg of the land and everything pertaining to it, except the beds of coal.

So far as I know, the question is entirely new. The plaintiff and defendant are tenants in common in undivided moieties of the coals underneath both estates, under the Bent Grange Estate, upon which this shaft is sunk, and under the Westwood Estate, which adjoins. The fact that this shaft was constructed for the purpose of working the coal of which both plaintiff and defendant are tenants in common in undivided moieties, is not disputed. It was sunk by Butterworth, in the character of tenant of both plaintiff and defendant. It is difficult to understand on what ground a work constructed by the tenant

of two persons, who are tenants in common in undivided moieties, with a view to the benefit of both the tenants in common, can be considered as the exclusive property of either. It is said that it is the exclusive property of Abraham Clegg and his co-defendant, because they are the exclusive owners of the land on which the shaft was sunk. But this is not a question about the ownership of the land. It is a question about the ownership of the shaft; and if the shaft was made at the expense of both, it is not easy to see how it can be considered as the exclusive property of the one who is owner of the soil. It is indeed said that it was made, not at the expense of both, but at the expense of the tenant. When a tenant constructs a work of that kind, it is with reference to his interest and to the interest of his landlord, and the expenditure of the tenant is an expenditure which it is impossible to treat as the expenditure of the tenant as an individual, giving him an individual right to that property which has been constructed by the expenditure of his money, because his rent payable to both is fixed with reference to that expenditure. The purpose for which the work has been constructed, and the circumstance that that purpose is a purpose beneficial to both the tenants in common, seem to me, upon a very intelligible principle, to exclude any exclusive right in the owner of the land, to the use of that which was constructed, not at his expense, not by him at all, but by a person who, in constructing it, was acting on behalf and under the authority of both.

No case has been cited on the subject, except that of the *Earl of Cardigan* v. *Armitage*, a case which has not the remotest application to the case of a tenant in common. There was no question there about anything done upon an expenditure with a view to the benefit of both. The only question in that case was upon the construction of an exception in a deed of grant, or in some document of title, which made it necessary for the court to consider what the rights were of a person who, being entitled to property under a grant, had that property in a useless state, unless with an implied right of access to it. Therefore, in disposing of this question, I am without the assistance of any authority whatever. It seems to me that, in the absence of authority, I am bound to decide it upon the principle that what is done by the tenant of two persons who

have a joint interest in property, with a view to the benefit of both, although done on the property of one, does not leave in that one any exclusive right to the use of it for his own benefit, so as not to entitle the person who bore his share of the burden to his share of the benefit of the use of the work thus constructed, to whatever purpose of advantage it may be used.

If this be the correct view, the court must declare that, having regard to the circumstances under which, and the purposes for which the shaft and work which, in the year 1850, were commenced, and completed in the year 1852, the late Abraham Clegg had not and Alice Clegg had not, and have not now, any exclusive right to the use thereof, and were not nor was either of them entitled to use, or to permit the defendant, Butterworth, or any other person to use the said shaft and work for the purpose of landing coals from the mines of other coal-owners for their own benefit and profit, to the exclusion of the plaintiff; but that the plaintiff is entitled to an equal half part or share in all such benefit and profit. There must be an account of all sums received by the late defendant, Abraham Clegg or his representatives, or by Alice Clegg, or by any person or persons, by their or either of their order, or for their or either of their use, in respect of landing rent or otherwise, for landing through the said shaft coals from the mines of other coal-owners, and of what remains due to the plaintiff and from whom, in respect of plaintiff's share of such landing rent. Also an account of all sums due to the plaintiff in respect of rent and profit for the working of the coal under the Bent Grange and Westwood Estate, from the 1st of January, 1852. As to the costs of the suit, there has been failure of the case of the plaintiffs so far as relates to the agreement of 1846. There has been failure on the part of the defendants, both of them, so far as relates to the agreement which they set up, as made in October, 1840. There has been a great mass of evidence on both sides, which has occasioned a great deal of expense, and produced no benefit to either. The case is one, therefore, of partial success and partial failure.

As to the agreement: Declare that it does not appear to the court that there is any valid agreement subsisting between the plaintiffs and the defendants, or either of them, as to working or landing the coal of other coal-owners, to the specific per-

formance of which either the plaintiff or any of the defendants is entitled, according to the alleged parol agreement of the month of October, 1840, as stated in the answer of the defendants, Abraham Clegg and Thomas Butterworth. Further consideration will be reserved; no costs to either party up to the hearing.

THE NORTH PENNSYLVANIA COAL CO. v. SNOWDEN.

(42 Pennsylvania State, 488. Supreme Court, 1862.)

[1] **Jurisdiction of equity.** A court of equity has no jurisdiction of a bill brought by one tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges, founded on legal title, until those rights have been established at law.

[2] **Trial by jury in common law causes is a constitutional right,** and a law that any such causes shall be tried "agreeably to the course of a court of chancery" is obnoxious to the right and void.

Act enlarging equity jurisdiction, unconstitutional. The act of April 22, 1856, giving a tenant in common in coal or iron mines, whose right is denied or resisted, the power to apply by petition in equity to the court of common pleas to adjudicate and determine the rights of the several parties according to the course of a court of chancery, conflicts with the constitutional right of the citizen to have controverted questions of fact in common law causes decided by a jury.

Certiorari to the Common Pleas of Luzerne County. In equity.

This was an appeal by the North Pennsylvania Coal Company (who with the Mill Creek Coal Company were respondents in the court below) from the decree of the court on a bill in equity, filed against the appellants by James Ross Snowden.

The facts of the case as disclosed by the bill and answer, so far as they relate to the action of this court, are fully stated in the opinion of this court.

[1] Approved, *Frisbee's App.*, 14 M. R.—.

[2] *Irwin* v. *Davidson*, 7 M. R. 237; *Kahn* v. *Old Telegraph Co.*, 11 M. R. 646; see note to the Text case, 82 Am. Dec. 536.

The case was argued by STANLEY WOODWARD, for appellant, and by RICHARD BRODHEAD and E. L. DANA, for the appellees.

By the Court, STRONG, J.

The bill of the complainant charges that under a deed from Luther Jones, dated April 22, 1799, to William Hooker Smith, his heirs and assigns, and by virtue of sundry mesne conveyances, he has become the owner of certain mining rights and privileges upon a certain tract of land which it describes. These rights and privileges are stated to be "a privilege to dig and search after stone coal or any other mineral, without interruption, molestation, denial or hindrance, and to have free liberty to carry off any mineral, with teams or otherwise; the said Jones to have an equal right with said Smith, and to have the right of joining in partnership with said Smith." The bill further charges that by reason of the said grant from Luther Jones, and the conveyances from the executors of the will of William Hooker Smith, the complainant became, was, and is entitled to the full possession, use and enjoyment of the said rights and privileges, and that the defendants, contrary to equity and good conscience, and to the great wrong and injury of the complainant, have denied and resisted his right and claim to the said mining rights and privileges, and to the coal mines and minerals on the lands, and have also denied and resisted the use, exercise and existence of said rights, and still deny and resist the same. The bill then proposes interrogatories whether its allegations are not true. The relief prayed for is that the defendants may account for and in respect to all the mining operations conducted on the premises, and that the court may decree that the complainant is entitled to the exclusive use and enjoyment of the said mining rights and privileges, and that they are duly vested in him, and that the defendants may be enjoined against interfering with him in the lawful and proper use of said rights, and from obstructing or in anywise preventing the exercise thereof, and from denying or resisting his said claim or right, or denying or resisting the use, exercise or existence thereof.

Had the court of common pleas jurisdiction of such a bill

in equity? It is observable that the bill does not charge that the defendants have succeeded to the rights that remained in Luther Jones, after his deed to William Hooker Smith, or that they claimed any interest in the coals or minerals in the land, or that they had ever been in possession of the land or received any of its profits. Though it contains a prayer for an account, it lays no foundation for one, and seeks it only as a consequence of the other relief for which it prays. It is true that by the sixth and seventh interrogatories the defendants are required to answer whether they have not entered on the land, and usurped the mining rights and privileges and prevented the complainant from enjoying them; but these acts are not charged and the stating or charging part of the bill is not helped by the interrogatories: Story's Eq. 27.

Then what is the bill more than an attempt to obtain, through the decree of a chancellor, the possession and enjoyment of certain mining rights, from which he claims that he has been deforced? If these rights amount to a corporeal hereditament—if, under his deeds, he took an interest in the stone coal and minerals in the land, the bill seeks to secure precisely what would be obtained by the common law action of ejectment. It is then what is sometimes called an ejectment bill, and is demurrable, and would be, even though it had charged that the defendants had got the title deeds, and had mixed boundaries as well as prayed for a discovery, possession and account: 1 Daniell's Chan. Prac. 610, and cases referred to in the notes. Then the bill charges nothing to give the court equity jurisdiction. It, at most, sets up a case for which there is, and always was, a complete remedy at law. Even the title, stated by the complainant to be in himself, is a strictly legal one, whether it be a corporeal or incorporeal hereditament or an easement. It may be admitted that a bill will lie by one tenant in common to restrain the commission of waste by his co-tenant, or to procure partition: *Hawley* v. *Clowes*, 2 Johns. Ch. 122; but even in such cases, confessedly within the jurisdiction of a court of equity, such a court will not interfere, if the complainant's title be denied, until he has vindicated it at law: 2 Atk. 280; *Bishop of Ely* v. *Kenrick*, Bunb. 322; *Coxe* v. *Smith*, 4 Johns. Ch. 271; *Phelps* v. *Green*, 3 Id. 302. It is true the court will sometimes retain the bill until the right

has been tried at law. But here no tenancy in common is charged and the bill itself, without awaiting the plea or answer of the defendants, alleges as the *gravamen* of complaint that the defendants deny the plaintiff's title. Nor is this a case of partition. It has never been held that equity courts have jurisdiction of actions founded on legal title, brought by one tenant in common against an alleged co-tenant to obtain possession or enjoyment of land.

And if the complainant's rights are incorporeal rather than an interest in the coal or minerals, the case which he presents is not the less a case at law, and without the jurisdiction of a court of equity. His rights are strictly legal and his remedies are at law. His bill does not even allege that he is without adequate remedy at law. It may be admitted that to prevent the disturbance of an acknowledged easement, a court of equity will interfere. But the right of the plaintiff must be acknowledged or established at law before he can resort to a chancellor. Mr. Justice Woodward in *Rhea* v. *Forsyth*, 1 Wright, 503, has collected numerous authorities on this subject. Others are at hand but they are not needed. But when the complainant himself avers that his right is denied, and when that denial is the very ground of his complaint, it would be a novelty indeed for a court of equity to assume jurisdiction. Has it ever been supposed that one claiming a right of way over the land of another can file a bill in equity complaining that the right which he claims is denied, and that enjoyment thereof is refused to him, and praying for an injunction against such denial and refusal of his enjoyment? Has any chancellor ever sustained such a bill, or considered that he had jurisdiction of such a complaint? If he has, then there is no longer any distinction between legal and equitable rights, and it would be hard to conceive of a case of which chancery has no jurisdiction. That there is, however, and always has been, a class of cases which are exclusively cognizable in courts of law, and over which courts of equity have no jurisdiction, is not to be doubted, and we think the complainant's is one of them. The distinction between what are known as equity cases and those which are not has always been recognized in this State from its earliest existence as a Commonwealth. If the complainant's case then is not saved by the Act of Assembly of April

22, 1856, his bill should have been dismissed, because it presented no case of which the court could assume jurisdiction in equity.

But what is the effect of that Act of Assembly? It enacted that, in addition to the rights granted to persons holding coal or iron ore mines or minerals, as tenants in common, by the 24th section of the act of 25th April, 1850 (a section which enabled such tenants in common to go into equity for an account), any person or persons claiming to be tenants in common, joint tenants or otherwise interested in any coal or iron mines, or other minerals, and which tenancy claim or right shall be denied or resisted by any other person or persons claiming the same, it shall be lawful for such tenant in common, joint tenant, or other party in interest, to apply by bill or petition in equity to the court of common pleas of the county in which the lands lie, setting forth the right or interest which such claimant has, or claims to have, in said iron ore, coal mine or other mineral, and that the use, exercise or existence of said right is denied by the persons claiming the same, whereupon the said court shall proceed to examine, adjudicate and determine the rights of the several parties in the manner prescribed in the above recited section (that is, as is expressly enacted according to the course of a court of chancery), and all parties in interest shall be made parties to such proceeding. It is noticeable that this act changes, not so much the tribunals in which the controversies of which it speaks may be tried, as it does the mode of trial. The controversies must be adjudicated in the manner prescribed in the act of 1850, and that expressly enacts that the court shall proceed "agreeably to the course of a court of chancery." What that course is, is well known. The chancellor adjudicates not only upon the equities of the case, but he determines the facts out of which the equities arise.

He may indeed call in the aid of a jury, but their verdict is not binding upon him as it is in a court of law; he may disregard it and decree in opposition to it. The trial, according to the course of a court of chancery, then, is trial by a single judge. But if there is any right to which, more than all others, the people of Pennsylvania have clung with unrelaxing grasp, it is that of trial by jury. They brought it with them from

the land of their fathers. In every constitution which has been adopted, they have taken care to secure it against infringement, and put it beyond the power of either the executive, the legislature or the courts to take it away from any individual. In that of 1776 the 11th section of the Declaration of Rights was "that in controversies respecting properties, and in suits between man and man, the parties have a right to trial by jury," which ought to be held sacred, and the plan or frame of government, while giving to the supreme courts and the several courts of common pleas the powers of a court of chancery as to perpetuating testimony, obtaining evidence, and the care of lunatics, and such other powers as future assemblies might give not inconsistent with that constitution, added immediately, "trial by jury shall be as heretofore." The constitution of 1790, and the amended one of 1838, contain substantially the same provisions though, if possible, more emphatically stated. Their language is, "Trial by jury shall be as heretofore, and the right thereof remain inviolate." What can this mean but that the right of having controverted questions of fact in common law cases decided by a jury, should be beyond the reach of any department of the government, whether it be the legislature, the executive or the judiciary? This was the right which had always been enjoyed before, and if the constitutional provisions were not intended to protect that in all its length and breadth they can mean nothing. It is true, the legislature are authorized to vest in the courts such powers (beyond those enumerated) to grant relief in equity, as shall be found necessary (Art. 5, § 6), but this must be understood as referring to powers in equity cases, in that class of cases of which chancery had jurisdiction. Such an understanding is necessary to make the different parts of the constitution consistent with each other, and to give effect to all. It can not mean that the legislature may confer upon the Supreme Court and the courts of common pleas, the power of trying according to the course of chancery, any question which has always been triable according to the course of law by a jury. If it can, then an ejectment founded solely on legal title, an action of debt on bond, or a replevin, or an action of trespass, may be sent into chancery, all contested facts in it be decided by the judge, and the intervention of a jury be unknown.

Then what has become of the constitutional right of the citizen? Such a doctrine would startle the people of this commonwealth, and justly, for it would deprive them of one of their most valued privileges. No power in our government can take from the litigant the right to have his case tried by a jury, substantially in the mode and with the same effect as that which belonged to jury trials in similar cases when the constitution of 1776 was adopted. What is law and what is equity, is a judicial question. It belongs, therefore, exclusively to the judiciary. But were it admitted that the legislature could authoritatively convert a legal right into an equitable one, a court of equity could not, as such, enforce it. The judiciary, no more than the legislature, can deny to any litigant the right of trial by jury, in a case appropriate to such a mode of trial.

The act of 1856, then, is applicable only to cases in which the rights of the complainants are equitable. It would conflict with the constitution if it had a more extended application.

The defendants in this case had a right to a trial according to the rules of law. They had a right to have submitted to a jury whether the privileges of the complainant existed upon the lands described in the bill, and whether they had been guilty of denying and resisting those rights, or disturbing the complainant in the enjoyment of the same. Of this mode of trial they could not be deprived, and even the act of 1856 furnishes no sufficient warrant for denying it to them.

It follows that this was not a case of which a court of equity had jurisdiction, and the decree must, therefore, be reversed.

With such views of the want of jurisdiction in the court, it would be improper to express any opinion respecting the merits of the controversy between the parties.

Decree reversed and bill dismissed with costs.

THE BOSTON FRANKLINITE CO. V. CONDIT ET AL.

(19 New Jersey Equity, 394. The Court of Chancery, 1869.)

Joint tenants—Tenants in common. A conveyance to two *without* the words "to be held as joint tenants and not as tenants in common" creates a tenancy in common, without survivorship; and a deed to trustees is to be construed in the same manner.

Statute null to divest vested rights. Vested rights can not be changed or divested by a subsequent statute. The act of 1868 attempting to change trust estates held in common to joint tenancies can not operate upon past estates although it was intended to be retroactive.

Descent of trust estates. Lands held in trust, upon the death of the trustee descend to the eldest son, as at common law, and are not within the Statute of Descents.

Conveyance by trustee. When lands are held in trust by two, both the trustees must join to execute the trust. If one convey, the legal estate as to a moiety passes, subject to the trust. Whether both trustees must join in the same deed, *quære?*

[1]**One tenant in common can not convey** his right to any specified portion of the premises or any right in the same, as the right to dig ores, to the prejudice of his co-tenants. Such conveyance is void as to the co-tenants though good as against the grantors.

Partition. The grantee of the right to dig ore, under one of several tenants in common, can not enforce partition.

The case was argued on pleadings and proofs.

Mr. HAINES and Mr. MCCARTER, for complainant.

MR. BRADLEY, for defendants.

THE CHANCELLOR.

The bill is for partition. The complainant claims title to one equal moiety, or half part of the iron, zinc and other ores, in a tract of land in the county of Sussex, known as the Ogden Mine Tract. The defendants are seized of the fee of the whole tract, subject to the right of the complainant. This title is not disputed by the complainant, but the defendants deny the title of the complainant to one half the ore in the tract or to the ore in an undivided half of the tract, and deny the right to have partition.

[1] *Adam* v. *Briggs Co.*, 13 M. R. 225; *Hartford Co.* v. *Miller*, 3 M. R. 353; *Smith* v. *Cooley*, 65 Cal. 46; *Markoe* v. *Wakeman*, 107 Ill. 252.

Samuel G. I. DeCamp was seized of the Ogden Mine Tract in 1817. On the 26th day of March in that year, he, with his wife, conveyed it, with other property, to W. Darrah and W. F. Kerr in fee, in trust to sell and pay his creditors out of the proceeds. In May, 1830, W. Darrah died, leaving H. T. Darrah, his eldest son, and other children surviving. On the 13th day of April, 1833, Kerr, the surviving trustee, by deed reciting the conveyance in trust and that he conveyed as surviving trustee, conveyed the Ogden Mine Tract to J. E. Edsall and S. Fowler, for the consideration of $50, the tract containing twenty and a half acres. On the 1st day of September, 1836, Fowler and wife, by deed dated on that day, in consideration of $21,000 conveyed to Witherill and Ames, in fee, six tracts of land, described by metes and bounds, containing about 3,200 acres, which did not include the Ogden Mine Tract; and "also all the iron, zinc and other ores, on or within any of the lands of the said S. Fowler in the county of Sussex." The deed contained full covenants of ownership, seizin, freedom from incumbrance, right to convey and of warranty, as to the "lands and premises described in it." By several mesne conveyances, this right to ores in the Ogden Mine Tract, if any was conveyed to Witherill and Ames, was conveyed to and vested in the complainant.

On the 14th day of October, 1836, Henry T. Darrah, with two other children of W. Darrah, deceased, by deed reciting the conveyance by Kerr, and in consideration of $1, did grant, bargain, sell, alien, enfeoff, convey and confirm unto Edsall and Fowler, the said Ogden Mine Tract. S. Fowler, by deed dated August 25, 1843, conveyed to his son, S. Fowler, Jr., the undivided half of this tract, with covenants against his own acts; and S. Fowler, Jr., on the 3d of February, 1847, conveyed this undivided half to Edsall. The title of Edsall in the tract was by several mesne conveyances vested in the defendants.

The defendants contend, first: That the deed from DeCamp to Kerr and Darrah conveyed the title to them as tenants in common, and that on Darrah's death the title to one half vested in his son Henry, and did not survive to Kerr; that the deed from Kerr to Fowler was void, as one trustee can not alone execute a trust, or convey the part of which the legal

title is vested in him, without his co-trustee joining; and that, as the conveyance from H. T. Darrah to Fowler was not until after Fowler's deed to Witherill and Ames, no title to this lot or the ores in it, passed by that deed. Secondly: That if any title did pass to Fowler and Edsall by Kerr's deed, it was only the title to the one half which was vested in Kerr, and that Fowler did and could convey to Witherill and Ames only his share or one undivided fourth. Thirdly: That Fowler, being only a tenant in common, could not convey any specific part of the land, or any right to ores or any other easement in the common property, and that such conveyance was void as against Edsall, his co-tenant. Fourthly: That the effect of the words "all the ores on, or within any of the lands of said S. Fowler in the county of Sussex," is to convey only the ores on Fowler's lands, and not on lands of him and Edsall, on which he had no right to convey all the ores.

The first question is whether the deed from DeCamp conveyed this land to Darrah and Kerr as tenants in common or joint tenants. It was five years after the act of 1812, (Nix. Dig. 150, § 34, Rev. Laws, 650) which declares that no estates shall be considered in joint tenancy, unless it be expressly set forth in the grant creating it, that it is the intention of the parties to create an estate in joint tenancy, and not an estate of tenancy in common. This deed contains no such words; it is simply to the grantees, "their heirs and assigns," "to have and to hold to them, their heirs and assigns;" and if this statute is applicable to lands conveyed in trust, this tract by force of it was vested in them as tenants in common. The words of the statute are general and clearly include grants or conveyances to trustees. There is nothing in the statute to limit it so as to exclude trusts. There is nothing in the preamble of the statute to limit the natural meaning of the words; it simply recites that, "Whereas, estates granted to a plurality of persons, have heretofore been held to be estates in joint tenancy," therefore it was enacted, etc. It shows that the object was to change the rule, and that the words which before created a joint tenancy should thereafter create a tenancy in common. The object, no doubt, was to give to the words used the effect which most persons would suppose they had. When lands were conveyed to two persons and their heirs few

supposed that the heirs of the one who happened to die first would have none of it, and that they gave it to the survivor and his heirs. There was the same reason for changing the law in the case of trust estates as in other cases. A person choosing two trustees does so because he wants more than one, and naturally may suppose when he conveys to two and their heirs, that if one dies his heir will act with the survivor. To be sure, the evil consequences would not be so great in the case of a trust estate as in other cases; but the wrong to be remedied existed in that case as in others. No wrong results from applying the act to trust estates. And although cases exist in which a construction has been given to a statute different from the plain meaning of its words, they are cases in which these words have been extended to matters plainly within the mischief to be remedied, or in which the application of the words in the full extent of their natural meaning, would work evident injustice or lead to great absurdity, which was evidently not intended or contemplated. In this case there is no injustice or absurdity whatever; the only question is, whether, if the case of trustees had been brought to the consideration of the legislature, they would have thought it wise or expedient to include them in its provisions. As it is they thought of no cases which it was expedient to except, and did not except any. No case is cited where an exception has been made from the plain words of a statute, because the court was of opinion that it would have been better or wiser to except such cases, or that the legislature would have excepted them, if appealed to on the subject. It is much better for courts to be governed by the plain words of a statute than to aim at evading their effect, even for good ends; and in no case should they be over-ridden, except one of evident necessity to effect an intention plainly shown.

The act relative to trustees, passed April 1, 1868 (Nix. Dig. 1006) was intended to change this rule in the case of trustees, and had it been passed before 1817, would have made this an estate in joint tenancy. This act was intended to have a retrospective effect, and by its words applies to all estates theretofore granted, and thereafter to be granted. And although an act will not be construed to have a retrospective effect unless its words expressly require it, yet this

act must be so construed. But so far as it affects estates vested before its passage, it must be held to be unconstitutional and inoperative. This principle has been held by the courts of this and other States to limit the operation of the act relating to married women, in cases where the husband's right had vested. *Van Note* v. *Downey*, 4 Dutch. 219; *Ryder* v. *Hulse*, 24 N. Y. 372; *Westervelt* v. *Gregg*, 12 N. Y. 202.

The comparison made in the preamble of the act of 1868, between the act directing the descent of real estate, and the act of 1812, shows a want of attention to the expression in the Act of Descents, by which it is held not to apply to trust estates. The first words in the first section of the Act of Descents are: "When any person shall die seized of any lands in his or her own right, in fee simple." By force of these words the statute can not be applied to persons who die seized in trust for others, and not in their own right. At common law a power in trustees, when coupled with an interest or estate in the trust property, survived, but this was because the estate survived. It is so laid down by Lord Coke: Co. Litt. 113a. And this is the authority referred to in all subsequent cases on this subject. A naked power without interest never survived: *Lane* v. *Debenham*, 11 Hare, 188.

The deed from DeCamp must be held to have conveyed this tract to Darrah and Kerr as tenants in common, and upon the death of W. Darrah, his undivided half descended to his eldest son, H. T. Darrah, who became seized as tenant in common with Kerr, in trust for the purposes in the deed of DeCamp; that is, in trust to sell this tract, and with the proceeds to pay creditors.

This power must be exercised by both trustees; one alone can not execute it. The trust is to sell the whole property, or rather the whole estate, as it may be sold in parcels. A deed by one trustee might convey his legal estate in a moiety subject to the trust, but could not convey any beneficial interest in the estate. 2 Story's Eq. Jur., § 1280; Hill on Trustees, 305; Willis on Trustees, 136; Lewin on Trusts, 297, 298; *Attorney General* v. *Gleg*, 1 Atk. 356; *Holcomb* v. *Holcomb*, 3 Stockt. 286; *Sinclair* v. *Jackson*, 8 Cow. 553, 554, 582, 584; *Wilbur* v. *Almy*, 12 How. 180; *Chapin* v. *First Universalist Soc.*, 8 Gray, 580.

If this be law, then, at the date of the deed from Fowler to Witherill and Ames, he owned no part or interest in the tract, or at best was a mere trustee of the legal estate. And the general words in this deed, "also all ores on or within the lands of said Fowler in Sussex County," did not convey any right in this tract, as it did not belong to Fowler, at least in the sense there intended. It would not be pretended that they would convey the ores in lands which he held as trustee for a stranger. Nor did the subsequent deed from Henry T. Darrah, if it be held sufficient to complete the title in Fowler and Edsall, aid Witherill and Ames. Fowler's deed to them warranted the described lands and premises only, and the covenants can not be held to apply to any other lands that he might own, or to imply that he owned any other. The grant of ores could not be extended to lands that he had agreed to purchase and which were afterward conveyed to him. The title then, which he acquired by the conveyance being made efficacious by the deed from H. T. Darrah, could not pass to Witherill and Ames by estoppel, and therefore inured to the grantees, Edsall and Fowler, for their own benefit, and is now held by the defendants.

The third position of the defendants is, that if the conveyance to Edsall and Fowler was valid, Fowler, being a tenant in common, could not, as against Edsall, convey his right to any specified portion of the premises, or any right in the same, to the prejudice of his co-tenant. This seems to be the established rule of law. Such deed will be held to bind the grantor, but as to his co-tenant it is void. The reason is, that it would prejudice the right of the co-tenant to a partition. Each tenant in common of an undivided moiety, has a right to partition by having one half of the whole premises set off to him; he must not be compelled to partition one part with one co-tenant and another with another co-tenant, as he would be if such conveyance were good; but the partition must be made into two shares between him and his co-tenant, and then, if the part conveyed by the co-tenant shall fall within the share allotted to him, his deed for the same will bind him and convey it to his grantee. So if the ores in one undivided half be conveyed, as in this case the co-tenant will not be affected by it, but would be entitled to a partition of the whole between him and his

original co-tenant, without regard to the rights of the grantee. The whole tract must be divided into two shares equal, not in quantity, but in value; the ores and mines on one part would be valued as against the meadows, water power or buildings on the other part. And if the part containing the mines or minerals were allotted in partition under the acts requiring partition by lot, or assigned on other proceedings to the co-tenant, he would have the right to retain it although the grantee of the ores should thereby lose all right. His title as against such co-tenant is void. In this case the title to the land having become vested in Edsall in severalty, and through him in the defendants, there can be no partition, and the right conveyed by Fowler to Witherill and Ames can not have effect given to it, assuming that Fowler had title at the time of that grant. The doctrine that a conveyance by a tenant in common of a specific part of the lands held in common, or of a special right or easement, in the common lands, is void as against the co-tenant, is founded on principle and sustained by many authorities. 4 Kent's Com. 368; 1 Washb. on Real Property, 417, § 5; *Porter* v. *Hill*, 9 Mass. 34; *Bartlet* v. *Harlow*, 12 Mass. 348; *Varnum* v. *Abbot*. Id. 474; *Blossom* v. *Brightman*, 21 Pick. 283; *Peabody* v. *Minot*, 24 Pick. 329; *Adam* v. *Briggs Iron Co.*, 7 Cush. 361; *Griswold* v. *Johnson*, 5 Conn. 363.

This doctrine was adopted and approved in this court by Chancellor Williamson in *Holcomb* v. *Coryell*, 3 Stockt. 548.

On both grounds I feel compelled to hold that the complainant has no title to this ore, that is valid as against the defendants, or that will entitle the complainant to a partition, or any other relief as against them.

The bill must be dismissed.

GRAHAM ET AL. V. PIERCE.

(19 Grattan, 28. Court of Appeals of Virginia, 1869.)

Several use of common property. Tenants in common may use and enjoy the common property severally and need not account for the rents and profits, except under the statute for so much as they may receive beyond their just share.

Measure of co-tenants' accountability. The best measure of the accountability of one who uses the common property severally is his co-tenant's share of a fair rent of the property so used; but under peculiar circumstances resort will be had to an account of issues, profits, etc.

[1] **Accounting between co-tenants of mines.** In the case of a tenancy in common in lead mines, an account of issues and profits is the proper mode of adjustment. And in settling the accounts of the operating tenants, they should not be charged a sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing the lead, but each so operating is to be charged with all receipts and credited with all his expenses on account of the operation of the mine.

[2] **Allowance for improvements.** The operating tenant should have a credit for necessary improvements made by him.

Waste by co-tenant. A tenant in common who uses the common property separately will be liable to his co-tenant for the destruction or wasting of the common property through his gross negligence, but he can not be held responsible unless the bill charges such waste.

Practice as to further accounting stated where a remnant of the business remains undisposed of.

In February, 1854, David Graham and thirteen other persons, partners under the name of The Wythe Union Lead Mines Company, filed their bill in the Circuit Court of Wythe County, against Alexander Pierce and Alexander N. Chaffin. The plaintiffs allege in their bill that they are the owners of fourteen sixteenths of valuable lead mines lying in the county of Wythe, to which is attached a large quantity of land and valuable fixtures for the manufacture of lead on an extensive scale; and the remaining two sixteenths belong to Alex. Pierce and Alex. N. Chaffin. That the property is incapable of division without greatly impairing its value. That the plaintiffs formed a partnership in February, 1848, under the style of the Wythe Union Lead Mines Company, to continue until

[1] *Sears* v. *Collins*, 12 M. R. 400.

[2] *Pickering* v. *Pickering*, 63 N. H. 468; note, 62 Am. Dec. 484; see *Neuman* v. *Dreifurst*, 9 Colo. 223.

February, 1858, for the purpose of mining and manufacturing ead. That they had proposed to the other parties to join them, but that Pierce had refused to do so, and had taken possession of a part of the property and improvements and was working them separately. That whilst the plaintiffs were working on the principle of reducing all their expenditures to the cash value, and their business showed large profits, Pierce was doing great injury to the property, expending a great deal in improvements that were not necessary to the working of the mines as a whole, and was employing hands who were incompetent and idle. That he was carrying on a store in connection with his mining operations, and would employ only such hands as would take their payment for wages from his store, and was conducting his operations so as to show small profits from his mining, and would afford large profits upon his sales from his store, which he claims as his own, and that he had not made any dividend of his profits from mining, up to the time of filing the bill, and from what they knew of the principle on which his business was conducted, they had but little hope that any length of time would produce a different result. They insist that the profits from the store should be considered as partnership profits, and should be accounted for as such. The defendant Chaffin had stood aloof, taking no part in the business.

The prayer of the bill is, that an account may be directed of the operations of the said Pierce in the manufacture of lead at the mines where he was operating, from the commencement of his business in February, 1848, to the time of filing the bill, and that in taking said account the commissioner be directed to ascertain what amount of lead he had made and at what average price per ton; what profits had been derived therefrom, and to whom they rightfully belonged; also what profits had been realized by Pierce during the same time from the mercantile establishment which had been carried on by him in connection with the making of lead at the mine, and any other account which will be necessary to show the liability of Pierce to the other owners of the joint property, growing out of his operations at the said mines; and that all the joint owners may be decreed their just proportion thereof; that if it shall seem equitable and just, the profits of the mercantile concerns which may be carried on at the

mines in connection with the making of lead shall be the common property of the joint owners thereof, and distribution decreed to them according to their respective rights, and for general relief. There was a prayer for partition by a sale or an allotment of part and sale of the residue, if upon the final hearing this should seem advisable; but there was no action upon this question.

Pierce filed his answer on the 10th day of May, 1855. He says that all the owners joined in carrying on the business of manufacturing lead from the year 1838 to 1848, at which time the partnership expired; that the parties could not agree upon terms for continuing the business jointly; that the plaintiffs took possession of all the improvements; that the defendant, before he could realize anything from his interest in the property, was obliged to make large expenditures for sinking shafts, building furnaces and constructing buddles and crushing mills, all of which became fixtures on the estate, and are valuable improvements, and as such, his outlay upon them, out of his own means, is a proper charge against the receipts of the proceeds of lead. As to the profits of the store, he claimed they were his own, made by his own means; and in fact the plaintiffs had abandoned the claim to share them. He insists the plaintiffs shall account to him for his share of the profits of manufacturing lead made by them; says he is ready to account for rent and profits of the property after deducting from the gross receipts all his expenses in putting up fixtures, etc., cost of manufacture, transportation and sale; and he asks that whatever sum is due him from plaintiffs may be set off against what is due from him to them; and he insists that to see what the proper balance would be, the plaintiffs must render a full account of their operations.

On the day before the answer of Pierce was filed, viz., on the 9th of May, 1855, the plaintiffs and Pierce entered into an agreement under seal, by which Pierce sold to them all his interest in the property belonging jointly to the parties in the suit except a certain tract of land specified, for fifteen thousand dollars; and he bound himself, if he should thereafter acquire an interest in the property, that he would not come into competition with the owners of the property in the manufacture of lead, but that the business should be conducted jointly with the other owners who might be operating for the joint

benefit of all interested. And it was further agreed that Pierce might continue to smelt the ore he then had on hand ready washed for smelting, until the 1st of June following; and that the contracts made by Pierce with other parties for raising lead, etc., which were in progress, should be carried out; and that the plaintiffs were to receive from Pierce all the ore, both washed and unwashed, and slag, that was on hand on the 1st of June. And it was further agreed that as they had each been engaged in merchandising in connection with the manufacture of lead, they will, in the future settlement of their accounts, relinquish and abandon all claims, each upon the other, to mercantile profits, and in the settlement of their accounts they will have reference only to the quantity of lead made, the expense of making, transportation and sales, as disconnected with the mercantile business. And it was further agreed that in respect to the privilege of Pierce continuing the business as above stated, until the 1st of June, the expenses incurred or to be incurred, and the profits, were to be brought into account and settled between the parties; and that this agreement was not to preclude either party from having a fair and full settlement of all matters between them concerning the manufacture and sale of lead, with the single exception that the mercantile profits made by either party were not to be brought into the account.

On the 10th of May, by consent of parties, William A. Stewart was appointed a commissioner to take an account of the manufacture and sale of lead by the plaintiffs and the defendant Pierce from and after the 17th day of February, 1848, to be reported to the court, together with any matters specially stated, etc.

The commissioner returned his report on the 6th of April, 1857, in which he states that he has taken the account as directed, from February, 1848, to the 17th of February, 1857; and the complainants will hereafter render an account of a remnant of the business still left in their hands. He reported that the profits made by the plaintiffs during the period were $98,762.65, of which the share of Pierce and of Chaffin was each $5,904.05; that the profits made by Pierce, which were due to the joint owners of the property, were $3,815.38, of which Pierce and Chaffin would each be entitled to $229.62,

and the balance was due to the plaintiffs. And that upon the settlement of both accounts there was due from the plaintiffs to the defendant Pierce, $2,587.91, on the 17th of February, 1857.

All the parties excepted to the report; but it will only be necessary to state those of the plaintiffs, as the other exceptions did not come before this court. The plaintiffs excepted to the report:

1st. To all allowances made by the commissioner to the defendant Pierce, for buildings, fixtures and other supposed improvements; upon the ground that an occupying tenant in common, before he can entitle himself to such allowances, must show that such buildings, etc., were necessary to the interest of the entire estate, or added permanently to the value thereof. The supposed improvements, for which said Pierce has claimed credits, are shown by the evidence in the cause to have been unnecessary for the general interests of the estate; to have added nothing to its permanent value; and to have merely subserved the temporary purposes and promoted the individual interest of the defendant Pierce.

2d. To the whole frame and principle of the report. Instead of going into a detailed statement and account of the transactions and expenditures of the defendant Pierce—transactions and expenditures in which it is shown by his own manager that his object seemed to be to make money for himself, regardless of the interests of the other owners—it was the duty of the commissioner to fix a proper cash value per ton on the manufacture of lead, thus reducing all the operations and transactions of both concerns to a uniform standard. In this connection it will be seen that the two concerns worked on wholly different principles. The complainants reduced everything to a strict cash value, and charged the miners no profit on articles furnished by them. The defendant Pierce, on the contrary, charged a profit (usually fifty per cent.) upon everything furnished by him. It is further shown that Pierce only employed such hands as consumed all their wages in living; that all were trifling; none worth their wages. It is also in proof that Pierce declared that a small proprietor might make a large quantity of lead, and make a profit on expenditure by selling goods. He has not denied the charge in

the bill that his great object was to conduct the business in such a manner as to show no profits for dividend with his co-tenants, but to make a large profit for himself upon the expenditures. His own account, and the report of the commissioner, show how fully and unflinchingly he has carried out this design. He operated for seven years and a little over three months; and by his own account he brought the mines several thousand dollars in debt. The commissioner's account, after scaling his charges in many instances, shows only a profit of $3,875.38 upon a manufacture of 1250½ tons, or at the rate of $3.05⅛ per ton on the lead sold; whilst at the same time, upon the operations of the complainants manufacturing and selling 2668½ tons, there is a profit shown of $98,762.65, or at the rate of about $37 per ton; and this, too, whilst the complainants have expended many thousands of dollars on valuable and permanent improvements; have paid the taxes on the entire estate; purchased and paid for the Preston survey of 242,000 acres, at the price of $——, and paid the taxes thereon; and have incurred law expenses and other charges to a large amount, with which their expense account is burdened, and which contributed to swell the amount of their charges in the commissioner's report.

3d. Because the commissioner has not charged the defendant Pierce with the sum of $920, the damages recovered against the complainants upon the dissolution of an injunction. Pierce claims that he was working the mines on joint account. The damages to the business thus carried on by him are in lieu of the profits which he would have made while the injunction was pending. Those profits would have accrued to the general owner, not to Pierce alone. The damages allowed in their stead must take the same direction.

4th. To the allowance to Pierce of a credit for the amount of claim on George Earp, of $2,780.22. In his account he charges himself with the net sales of lead made by said Earp of Philadelphia, and afterward credits himself with said sum of $2,780.22, on the grounds of Earp's insolvency; this credit being objected to on the ground that Pierce had not shown that due diligence was used by him in attempting to recover the debt.

5th. Should the commissioner's plan and principle of stat-

ing the account be approved and adopted by the court, then we except to the allowance of the salary, board, etc., of R. C. Fox, T. W. Carter and J. W. Brown, on the ground that Pierce individually should bear one half of their salaries, etc., they being employed one half their time or more in his business.

It is impossible to give a statement of the evidence in the record. It may be stated that although these parties owned a large tract of land, the lead mines seem to have been located on about twenty acres of it. They had been worked previous to 1838 by several of the joint owners separately, each accounting for the profits he made to all the owners. In 1838 a partnership was formed by all the owners for the joint working of the mines, which was to continue until 1848. In February, 1848, all the owners but Pierce and Chaffin formed another partnership for carrying on the manufacture and sale of lead, which was to continue until 1858; and they took possession of all the localities and machinery which had been used by the former company. Chaffin declined to join the partnership, and did not attempt to carry on the business himself; but Pierce took possession of a part of the land and proceeded to carry on the manufacture and sale of lead separately. In what spirit the business was conducted by both the parties, as well as the nature and sufficiency of the evidence upon which the exceptions of the complainants are based, will appear from the opinion of the court.

In May, 1857, the cause came on to be heard, when the court overruled all the exceptions, both of the plaintiffs and the defendant, and confirmed the report, and decreed that the plaintiffs should pay to the defendant Pierce the sum of two thousand five hundred and eighty-seven dollars and ninety-one cents, with legal interest thereon, from the 17th of February, 1857, till paid; that being the amount reported by the commissioner as due from the plaintiffs to Pierce; and that they should pay the costs in proportion to their respective interests in the property, as it was held before the sale by Pierce to the plaintiffs.

From this decree the plaintiffs applied to the court of appeals at Lewisburg for an appeal; and in their petition they made another question, which is stated in the opinion of the

court. Pierce also applied for an appeal; and both appeals were allowed. After the war the case was sent to Richmond, and from thence to the district court of appeals at Abingdon. In July, 1867, the case came on to be heard, when the district court was of opinion that, as it appeared from the commissioner's report that the accounts between the parties were not fully settled and stated, but that the complainants were thereafter to render an account of some matters not reported on by him, the circuit court should not have proceeded to a final determination of the cause, but should have confirmed the said report and recommitted the cause to the commissioner, with instructions to state and settle the matters of account between the parties, referred to as not settled, but not to reopen or disturb the account so far as already settled, and make report of his proceedings to the circuit court; and upon the coming in and confirmation of such new report should pronounce such decree as equity may require. It was therefore decreed that so much of said decree as is declared to be erroneous be reversed and annulled, with costs to Pierce against the plaintiffs; and that the residue of the decree be affirmed. And the cause was remanded, etc.

From this decree the plaintiffs applied to this court for an appeal, which was allowed.

WM. DANIEL, for the appellants.

STAPLES and JOHNSTON, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that every tenant in common has a right to possess, use and enjoy the common property without being accountable to his co-tenants for rents or profits, except under the statute, for so much as he may receive beyond his just share or proportion: Code, p. 586, Ch. 145, Sec. 14. And although it may be best for the interests of all the tenants in common to use the common property jointly, by means of a contract of partnership between them, yet the individual owners have a right to decide that question for themselves, and are not bound to enter into such contract of partnership; but may possess, use and enjoy the property severally, account-

ing to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion, as aforesaid. Therefore the appellee, Alexander Pierce, was not bound to enter into co-partnership with his co-tenants in the use and operation of the lead mines in question, but had a right to use and enjoy the property separately on the conditions aforesaid.

The court is further of opinion, that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his co-tenants, or occupies and uses more of the common property than his just share or proportion, the best measure of his accountability to his co-tenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of *Early* v. *Friend*, 16 Grat. 21, 52. Yet, as was said in that case, "There may be peculiar circumstances in a case, making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common." Id., p. 54; *Ruffners* v. *Lewis*, 7 Leigh, 720. Under the circumstances of this case it was proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for use and occupation; nor is it such a case as that of *Early* v. *Friend*, where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment. Nor would it be just, in settling the account of issues and profits, to charge the occupying and operating tenants with a certain sum per ton for the quantity of ore raised from the mine, nor to credit them with an estimated sum per ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore,

which would depend upon its situation in the mine, its degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses, on account of the operation of the mine. This mode had been pursued by the owners of this mine prior to 1838, when several operations were conducted by different owners, who accounted with the other tenants for their shares and proportions of the net profits. It was also pursued by them from 1838 to 1848, during which period they all operated in one partnership. The same course ought to be pursued in regard to the operations since 1848, which were conducted by the appellants and the appellee separately.

They severally conducted their operations with the expectation of accounting for net profits with the other tenants in common, and kept their accounts accordingly. The agreement of the 9th of May, 1855, recognizes that mode of settlement as the proper one, and provides for the making of such a settlement. And the consent decree entered on the next day, the 10th of May, 1855, directs accordingly. The account was, therefore, properly settled in that mode.

The court is further of opinion that in settling the account of the appellee Pierce, the commissioner properly gave him credit for improvements made by him, and the circuit court, therefore, did not err in overruling the appellants' first exception to the report of the said commissioner. The said Pierce having a right as tenant in common to occupy and operate the mine, had also a right to make such improvements as were necessary for that purpose, and to deduct the cost of such improvements from the proceeds of the operation. It does not appear that he made any improvements which were not necessary, or were not of permanent value to the estate, or that he incurred any unnecessary expense in making them. All of them were necessary to his convenient occupation and use of the mine, except, perhaps, the small expense incurred in fixing up a building already on the land, for a store; and if it

be true, as seems to be the case, that good management in conducting the operations of a mine requires that a store should be kept in connection with such operations, then the fixing of the storehouse was a proper improvement to be made and charged for in the account. But whether it was necessary or proper for the operation of the mine or not, it was a permanent improvement of the property, which inured to the benefit of all the owners, and the expense of making it is, therefore, properly chargeable to them in the account. Although the improvements which were already on the property when Pierce commenced his operations may have been, as alleged, "amply sufficient for the judicious and beneficial conduct of the business," yet those improvements, or nearly all of them, were in the exclusive use of the appellants, and Pierce could not exercise his right as a tenant in common to occupy and use the mine without making other improvements which were necessary for that purpose. But it appears from the account of the appellants that a large amount was expended by them in making improvements after Pierce commenced his operations, which amount is charged in the said account and was allowed by the commissioner. And it appears from the evidence that the improvements made by Pierce, or nearly all of them, have been actually used by the appellants since they became purchasers of Pierce's interest in the mine.

The court is further of opinion that the circuit court did not err in overruling the appellants' second exception to the commissioner's report, being "to the whole frame and principle of the report." Reasons have already been given to show that in this case it was not "the duty of the commissioner to fix a proper cash value per ton on the manufacture of lead," with a view of settling the account upon that basis, but to go "into a detailed statement and account of the transactions and expenditures" of the parties, with a view to a fair and just settlement between them on account of profits actually received. The chief complaint of the appellants is, that Pierce conceived and conducted his separate operations of the mine with a view to his own profit and without any regard to the interests of his co-tenants in common; that he conducted a store in connection with his operations of the mine; that his plan was to turn the profits of the combined operation as

much as possible in the channel of the store, the whole of the profits of which were his, and to divert them from the business of the mine, the profits of which he had to share with his co-tenants; that he charged a large profit upon everything furnished by him from his store, and only employed such hands as would consume all or most of their wages in living, requiring them to buy all of their supplies from him; that all of them were trifling, and none of them were worth their wages; and that the result of his operations of the mine has been to make a very small profit compared with the profit made by the appellants, whose operations they say were conducted on a different principle. If this complaint had been materially sustained by the proofs, it ought to have had an important effect on the result of the case; but we are of opinion that it is not. As to the remark of Pierce, to which one or two of the witnesses testified, that a small proprietor might make a large quantity of lead, and make a profit on expenditures by selling goods, it does not appear when it was made, and it seems to have been a casual remark not sufficient to indicate a fraudulent purpose on the part of Pierce to pursue such a plan. He had a right to keep a store in connection with his mining operations, as the appellants did in connection with theirs; and according to the testimony it appears that it is conducive to the convenient and profitable operation of the mine to keep a store in connection therewith. He did not charge anything more for articles furnished from the store for use in his mining operations, or for the use of the hands, than he charged for similar articles sold by him to other customers, or than other merchants in the neighborhood charged for similar articles sold to their customers. And the commissioner, in settling his account, deducted the profits included in the charges for articles used in his mining operations, so as to place him and the appellants on the same footing in that respect, they having charged only cost for such articles used in their operations. If his hands were trifling and their services not worth their wages, it does not appear that he did not employ the best he could procure, and it is not pretended that he employed more than were necessary to his mining operations, or that he paid them higher wages than were paid by the appellants for similar hands. The profits of his store were small,

and much less than were the profits of the appellants' store during the same period. As to the profits of his mining operations compared with those of the appellants, it is impossible to ascertain them from the materials in the record, as a large amount of ore extracted by him from the mine was turned over by him when he sold out to the appellants, and the proceeds of it have gone into their accounts, thus swelling their apparent profits, while the apparent profits made by him are reduced by the expense of raising the ore and partly manufacturing it. The appellants had the great advantage of being in possession of almost all the old improvements and fixtures, and proceeded to carry on their mining operations without interruption, and no doubt with experienced hands, while the appellee had to make new improvements and probably employ new hands, and it was, therefore, a long time before he could commence his mining operations. He seems to have desired to do the best he could for the interest of himself and his co-tenants. Unfortunately he and they conducted rival establishments, both in regard to mining and merchandising; and still more unfortunately, the effect of this rivalry was to produce ill feeling between them and to cause them to throw stumbling blocks, instead of facilities, into each others' way. The natural fruit of all this was to involve them in angry and expensive litigation. But the appellants have no cause to complain of the appellee in this respect, and seem to have been, at least, as much in fault as he in bringing about these evils. The account between them may therefore be considered as balanced on that score. The necessary effect of rival establishments, even if they had produced no ill feeling nor conflict of action between the parties, would have been to reduce the profits of each by increasing the price of labor and supplies, and reducing the price of goods sold at the stores. The evil was greatly increased, in this instance, by the ill feeling and conflicts which were engendered by the rivalry between those parties. But, as before stated, the appellants have no just cause of complaint on that ground.

The court is further of opinion that the circuit court did not err in overruling the appellants' third exception to the commissioner's report, "because he has not charged the defendant Pierce with the sum of $920, the damages recovered

against the complainants upon the dissolution of an injunction." The ground of this exception is, that these damages were allowed by the jury in lieu of profits which Pierce would have made but for the injunction; and as the profits would have belonged to all the tenants in common, so ought the damages. But we can not tell what influenced the jury in allowing damages in the action brought by Pierce upon the injunction bond. We can not presume that they intended to compensate, not only the loss which Pierce alone sustained by the injunction, but also the loss which the appellants themselves, who were in effect the defendants in the action, sustained by their own injunction. We can not presume that the jury intended to allow damages, of which only one sixteenth would inure to the plaintiff in the action, while fourteen sixteenths would inure and be returned to the defendants themselves. The action, though in form *ex contractu*, was in substance *ex delicto*, and the evidence may have been such as to warrant the jury in allowing exemplary damages; in which case, of course, the defendants who did the wrong could have no right to participate in the benefit of the damages. Besides, we have no account in the case of the cost and expenses incurred by the plaintiff in prosecuting the action, or of the cost and expenses incurred by him in the injunction suit, over and above the legal costs recovered against the other parties.

The court is further of opinion that the circuit court did not err in overruling the appellants' fourth exception, which is "to the allowance to Pierce for the amount of claim on George Earp of $2,780, upon the ground that it was lost." Without reviewing the evidence in regard to this claim, it is enough to say that we do not consider it sufficient to show that the claim was lost by the negligence of Pierce. On the contrary, we think it shows that the claim was not lost by such negligence.

The court is further of opinion that the circuit court did not err in overruling the appellants' fifth and last exception, which is to the allowance of the salary, board, etc., of agents employed by Pierce. The ground of this exception is that these agents were employed as well about the individual business of Pierce as in his mining operations. But the salary of only one agent during the period of those operations is allowed

by the commissioner, and it appears that at least one agent was necessary and was employed in those operations during said period.

There is another assignment of error in the petition of the appellants to the district court for a supersedeas to the decree of the circuit court, being the 7th, which remains to be noticed, and is in these words: "The court erred in decreeing a balance in favor of Pierce against your petitioners under the facts of the case. Pierce refused to co-operate with them, and set up a rival establishment, which he so conducted as to yield comparatively no profits, and he is shown to have injured the common interests far more than the amount of his interest in the profits made by the company. No damage is allowed your petitioners for the injuries they have sustained. The decree allows him profits in their operation without holding him to account for corresponding profits or damages inflicted." Damage necessarily resulted to the appellants, both in their mining and mercantile operations, from the carrying on of similar operations by the appellee, and that is the kind of damage to which the witnesses, no doubt, generally refer in their testimony in this cause. But, as the appellee had as much right to carry on his operations as the appellants had to carry on theirs, such damage is merely *damnum absque injuria*. The appellee had no right to destroy or waste the common property, and if he had willfully done so, or by gross negligence had occasioned such destruction or waste, he would, undoubtedly, have been responsible, in some form or other, for the injury thus done to his co-tenants. Some of the witnesses in this case speak of much waste having been committed in the mining operations of the appellee by the unskillful and careless conduct of his agents and hands. It does not appear that he did not employ the best agents and hands he could under the circumstances. But a sufficient answer to this complaint is, that there is no charge in the bill of any such waste or destruction. It is a bill for partition and for the settlement of an account by the appellee both of his mining and mercantile operations. The chief complaint of it is, that he had so conducted his operations as to make a large profit by merchandising and a small profit by mining, and the complainants say, that "after very mature reflection and much actual experience,

at least a portion of them have come to the conclusion that the profits of the mercantile establishment, the necessary and indispensable accompaniment of the successful manufacture of lead, ought in equity and justice to be regarded as the joint property of the owners thereof, and that they ought to be participants in them equally, to the extent of their several interests in the subject out of which they were made." The complainants therefore pray for an account and relief accordingly. After the bill, but before the answers were filed, to wit, on the 9th of May, 1855, an agreement was made between the parties, whereby it was, among other things, agreed that Pierce should sell his interest in the mine and certain lands thereto attached for $15,000; and that "if said Pierce should hereafter acquire or purchase, lease or otherwise, any interest in the property before described, he is under no circumstances to work his own interest, or to come into competition with the other owners in the manufacture of lead, but the business in regard to the manufacture of lead, in the event he shall acquire any further interest, is to be conducted jointly, in conjunction with the other proprietors, who may be operating for the joint benefit of all interested." And it was further agreed by the parties, "that as they have each been engaged in merchandising in connection with the manufacture of lead, they will in the future settlement of their accounts, relinquish and abandon all claim, each upon the other, to mercantile profits, and in the settlement of their accounts they will have reference only to the quantity of lead made, the expense of making, transportation and sales, as disconnected with the mercantile business," "and that this agreement is not to preclude either party from having a fair and full settlement of all the matters between them concerning the manufacture and sale of lead, with the single exception that any mercantile profits made by either party is not to be brought into the account." On the day after this agreement was entered into, a consent decree was made, directing a commissioner to "take an account of the manufacture and sales of lead by the said complainants and by the said defendant Pierce, from and after the 17th day of February, 1848, to be by him stated," etc. It was the duty of the commissioner under this decree to take an account only "of the manufacture and sale of lead" by the parties respect-

ively, and not of any conjectural damages arising from any supposed destruction or waste of the property occasioned by the act or neglect of any of the parties, as that matter was not embraced in the bill, nor in the agreement aforesaid, nor in the said decree for an account. The commissioners, therefore, in taking the account properly disregarded that matter and all the evidence in relation thereto.

The commissioner having taken the account, and ascertained a balance to be due thereon by the appellants to the appellee, made his report, in which this passage occurs: "The complainants will hereafter render an account of a remnant of the business still left in their hands." The circuit court overruled all the exceptions to the report, confirmed the same, and rendered a decree for the payment of the said balance, but took no notice of what was said in the report in regard to the future account to be rendered by the complainants as before stated, although the decree was final. The district court was of opinion that the circuit court should not have proceeded to a final determination of the cause, but should have confirmed the said report and re-committed the cause to the commissioner, with instructions to state and settle the matters of account between the parties, referred to in his report as not settled, but not to re-open or disturb the account so far as already settled, and make report of his proceedings to the court, and upon the coming in and confirmation of such new report, should pronounce such decree as equity may require; and the district court decreed accordingly, reversing in part and affirming in part the decree of the circuit court, and remanding the cause for further proceedings, but gave to Pierce his costs in the district court. We think that instead of reversing in part and affirming in part the decree of the circuit court as aforesaid, the district court might perhaps, more properly, have amended the decree of the circuit court by directing the account to be taken which, according to the commissioner's report, the complainants were thereafter to render, as aforesaid, or by reserving liberty to any of the parties thereafter to apply by motion in the cause in the said circuit court for an order for such an account, and then have affirmed the said decree thus amended. It is not probable that the result of that account will diminish the balance already reported to be due to the appellee, and it

seems therefore to be unnecessary to withhold the payment of the said balance until that further account can be settled. The appellants do not object to the decree of the circuit court for not directing a further account. On the contrary, they say that "no exception was ever taken to the report because it was incomplete, or was not a finality;" "neither party asked for a new order for an account, nor for a re-commitment of the report;" "the decrèe taken by Alexander Pierce was final, disposing of the subject and the costs—no other or further proceeding was asked for by him;" and they therefore contend that the decree of reversal on that ground is erroneous. But as this error, if it be one, is to the prejudice of the appellee, and he does not complain, but is content with the decree of the district court as it is, we therefore think it ought to be affirmed.

Decree affirmed.

MURRAY ET AL. v. HAVERTY ET AL.

(70 Illinois, 318. Supreme Court, 1873.)

License by single co-tenant—Variance. In trespass by several tenants in common a plea that defendants entered by license of the plaintiffs is not sustained by proof of such license from one of the co-tenants.

[1] **Single co-tenant may not mine.** Tenants in common are seized of each and every part of the estate but it is not in the power of one to convey the whole, or the whole of a distinct portion, or to give a valid release for injuries done thereto, or to commit waste or to destroy the common property or do any act that will work a permanent injury to the inheritance; mining coal would work such injury.

Trivial errors will not justify reversal.

Appeal from the Circuit Court of La Salle County; the Hon. EDWIN S. LELAND, Judge, presiding.

This was an action of trespass, by Thomas Haverty and a number of others, against the appellants, for breaking and entering the plaintiffs' close, etc. A trial was had, resulting in

[1] *Contra, Job* v. *Potton*, 14 M. R. 329; *Crary* v. *Campbell*, 3 M. R. 270; We know of no mining case other than the above which treats a co-tenant acting in good faith as a mere trespasser.—R. S. M. Mining is not waste, it is use: *Vervalen* v. *Older*, 10 M. R. 540.

a verdict of $1,100 in favor of the plaintiffs, upon which the court rendered judgment, refusing defendants' motion for a new trial. The essential facts of the case appear in the opinion of the court.

ELDRIDGE & LEWIS, for the appellants.

DICKEY, BOYLE & RICHOLSON, for the appellees.

Mr. Justice SCOTT delivered the opinion of the court.

The declaration in this case is in trespass and contains three counts. The first is for breaking the close, digging and carrying away coal; the second is for stripping and uncovering coal in the mines on the premises, whereby the same were damaged, and the third is a count in trespass *de bonis asportatis*. Defendants pleaded first, not guilty, as to the whole declaration; second, *liberum tenementum*, as to the first and second counts, and, third, a license from all the plaintiffs to do the acts complained of. Replications were filed to all these pleas, and upon the issues joined thereon a trial was had.

No evidence whatever was offered under the plea of *liberum tenementum*, nor was there any offered by plaintiffs that would authorize a recovery on the third count, and it would seem the trial must have been had on the issues joined on the first and third pleas.

It is not controverted defendants dug and removed large quantities of coal from the premises described in the declaration, and hence the principal question is, whether they can justify under the license offered in evidence.

The land upon which the alleged trespasses were committed was owned at the time by tenants in common. It was subsequently divided and the east half set off to plaintiffs, for whose use the suit was brought. Prior to the entry of defendants upon the premises, they had entered into an agreement with Peter Howard, who was a tenant in common with plaintiffs, by which they obtained the privilege to enter and construct a drain across the premises, but below the vein of coal. It was to be for their own benefit, and for the privilege secured they were to pay $200.

The construction of the drain would necessarily require the excavation and removal of large quantities of coal, for which they agreed to pay at the rate of two cents per bushel.

It is insisted this license is a bar to an action of trespass for anything done by defendants in the execution of the contract.

One difficulty that presents itself is, the proof does not sustain the plea. It is averred defendants entered under the license of the plaintiffs, and issue was joined thereon. The evidence shows the license was obtained from but one of the tenants in common. Hence the license proven is not as broad as that averred in the pleadings. There is, therefore, no evidence that directly sustains the issue made.

Counsel, however, maintain that defendants can defend against the alleged trespasses, under a license obtained from one of the tenants in common. Waiving any technical objection that might be urged against the form of the plea, under this view of the law, we do not think the proposition assumed can be sustained either upon reason or authority.

The common law doctrine is, tenants in common are seized of each and every part of the estate but it is not in the power of one to convey the whole of the estate, or the whole of a distinct portion, or give a valid release for injuries done thereto. It has most generally been ruled that, as against the other co-tenants, such a deed is inoperative and void: *Marshall* v. *Trumbull*, 28 Conn. 183; *Hutchinson* v. *Chase*, 39 Me. 513; 4 Kent's Com. 368.

No principle is better settled than that one tenant in common can not lawfully commit waste or destroy the common property or do any act that will work a permanent injury to the inheritance. Our statute has authorized one tenant to maintain trespass or trover against his co-tenant, who shall take away, destroy, lessen in value or otherwise injure the common property. Mining coal or excavating and removing earth, would tend to injure, destroy and lessen in value the estate. Notwithstanding the fact, in contemplation of law, tenants in common are all seized of each and every part of the estate, still neither one is permitted with impunity to do acts deemed prejudicial or destructive of the interests of the other co-tenants. If a tenant in common can not himself lawfully dig and

remove the soil or coal or other valuable material beneath the surface, that would tend permanently to lessen the value of the estate, how can he grant that right to a stranger? Upon principle, the licensee can take no better title or higher authority than the licensor himself possessed. The law would not permit Peter Howard to enter upon the common property and remove from thence the coal deposits which must constitute the real value of the estate. Hence it follows his warrant or license to a stranger would afford no answer to an action of trespass brought by his co-tenants.

We have looked into the cases cited by counsel for appellants, but we do not think they sustain their view of the law. The case of *Baker* v. *Wheeler*, 8 Wend. 505, is most nearly in point, but it differs so widely in its facts, it can not be regarded as an authoritative precedent in the case at bar.

We are of opinion the evidence given on the trial does not sustain the plea which seeks to justify the acts of trespass under a license and the defense necessarily fails.

It is urged the evidence wholly fails to establish a trespass by defendants upon the particular tract of land described in the declaration. Without recapitulating the evidence, which is very voluminous, it is sufficient to say, that from a careful consideration, we are satisfied it fully sustains the finding of the jury. The testimony of some of the surveyors is full to the point, and although it is conflicting, the verdict is fully warranted by the whole evidence, both as to the fact of the trespasses, and as to the amount of damages found. We are unwilling to interfere with it for either cause.

No errors are perceived in the instructions that, in our view of the law and the evidence, could have misled the jury on the real issues involved. In the main they are correct, and although some trivial errors may have intervened, they are not of so grave a character as to require that a verdict should be set aside, which manifestly does justice between the parties. The judgment will be affirmed.

Judgment affirmed.

JOB v. POTTON.

(L. R., 20 Equity, 84. Before the Vice-Chancellor, 1875.)

Getting coals, when not waste. It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds.

[1] **License by two only out of three co-tenants—[2] Basis of accounting between co-tenants.** The plaintiff, a tenant in common of a coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join), by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal, with license to work the coal. Under this license some coal, but considerably less than two thirds of the whole, was raised, and one third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the plaintiff filed his bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised, and an account against all the defendants as trespassers; for an injunction and receiver, and for damages: *Held*, that the working was not a trespass; and the plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less cost of getting and raising, and for payment of one third to plaintiff.

Cause. In the year 1865, an estate called the Allsop Estate, at Bagillt, Flintshire, consisting of two separate parts, containing respectively 6 A., 3 R., 5 P., and 1 A., 3 R., 31 P., was vested in the plaintiff, Alfred Mortimer Job, and the defendants, Maria Potton, widow, and John Marriott and Caroline Eliza, his wife, in three equal shares as tenants in common in fee, Mr. Marriott being seized in right of his wife.

The estate, which had coal under it, was surrounded by a colliery called the Wern Colliery, being then and theretofore held and worked by another defendant, David Jones, to such an extent as to preclude the getting of the coal by any one except Jones. In 1865 the Wern Colliery workings approached the Allsop estate, and Mr. Potton and Mr. and Mrs.

[1] *Williams* v. *Morrison*, 28 Fed. 872; *Dougherty* v. *Creary*, 1 M. R. 36.
[2] *McCord* v. *Oakland Q. Co.*, 64 Cal. 134; 49 Am. R. 3.

Marriott were desirous of making arrangements with Jones for working the coal. Jones offered to give a royalty on the scale usual in the district, subject to a way-leave of 2*d.* a ton; and on the 9th of March, 1865, Thomas Roberts, a mineral surveyor, acting as the agent of Mrs. Potton and the Marriotts, wrote to Jones to say that the owners of the land wished him to "go on working," as they were willing to take the same as other landowners got, and that they were preparing an agreement for that purpose.

On the 18th of March the defendant, Jones, wrote to the plaintiff, saying he was in a position to work one of the seams of coal in a portion of the land, and asking whether he, the plaintiff, would allow him to do so, and upon what terms, to which the plaintiff replied on the 20th of March, as follows: "Mrs. Potton applied to me for my consent to work the coal. I wrote her I would do so, in consideration of her giving me an order to receive the amount of her share of royalty, to go to pay the sum of £100, and interest borrowed by her on deposit of her deeds some years since. She does not reply."

On the 21st of March, 1865, Roberts wrote to the plaintiff as follows: "I have been asked by Mrs. Potton and Mrs. Marriott to superintend their share of the royalty for coals at Bagillt, as I superintend for Dr. Richardson and P. P. Pennant, Esq., in the same work; and if you will authorize me to look to your interest, I shall feel thankful. Their terms on royalty are 2*s.* 6*d.* per collier's ton, or the ninth part: it comes to about the same. Mrs. Potton and Mrs. Marriott have agreed to 2*s.* 6*d.* per collier's ton. Please come to some agreement as soon as possible."

On the 24th of October, the plaintiff wrote to Jones to say he had received no reply from Mrs. Potton, and that, should he succeed in bringing her to her senses, he would immediately write and let him (Jones) know.

On the 15th of December, 1865, an agreement was made by the defendants, Mrs. Potton and the Marriotts, to let two undivided third parts of the coals under the Allsop estate to the defendant, Jones, for three years from the 15th of December, 1865, with full powers of working the same, and also the option of renewing the agreement for the term of ten years from the 25th of December, 1868.

The defendant, Jones, said that under this agreement he drove his level through a small portion of the Allsop estate, and during about two years, worked one of the seams under the estate to a small extent. This seam had not been previously worked but other seams had been. The total amount of the royalty, as agreed, upon the coals which Jones worked during the three years, was £98, 5*s*., 3*d*., out of which he reserved for the plaintiff, whenever he should claim it, the sum of £1, 15*s*., 1*d*., being one third of the royalty on the coal got, and he also left more than one third of the coal ungotten.

After the 21st of April, 1868, he ceased working.

On the 2d of May, 1868, the plaintiff wrote to the defendant, Jones, as follows: "I am informed that you, with others, are taking the coals from under the land of the estate called and known as the Pottons' Estate in Godly's Lane, Bagillt, in which estate I have an interest of survivorship; this being done by you without my knowledge or consent, I give you notice I repudiate all such workings, and ask you for a statement of what you have taken, and by what authority you have so taken it, so far as you have gone; and so far as you may go, I shall deem it a trespass for which I shall hold you responsible without my consent first had and obtained."

In answer, the defendant, Jones, wrote to the plaintiff on the 5th of May, 1868, stating the agreement of the 15th of December, 1865, and adding, "the sums to which they" (Mrs. Potton and Mrs. Marriott) "have been entitled under this agreement, as per accounts rendered to Mr. Roberts, are," (then followed a statement showing Mrs. Potton's share to be £27, 15*s*., 4*d*.). "A third part of the coal has been left in the ground intact for you, which I am in a position to win, if desired, but, if you prefer it, you can share in the royalty to which Mrs. Potton and Mrs. Marriott have hitherto been entitled, according me permission to win all the coal, and taking your third part in future. I am animated with the desire of acting in a thoroughly impartial way to each of the owners. * * * If the coal be not won now, it will probably not be won at all, as I am stripping all the coals surrounding the land, and it will never pay any one to sink pits, etc., for the purpose of winning from estates isolated as yours are, and so small."

On the 6th of May the plaintiff wrote to the defendant, Jones, saying he repudiated in the most positive manner being a consenting party to his taking coal from under the estate; and a correspondence followed, in the course of which the defendant, Jones, offered to send a return of the coal got, to allow plaintiff's surveyor to make a survey of the workings, and at once to hand over a sum equivalent to that paid to Mrs. Potton; and stated that in compliance with plaintiff's request, he had ceased working.

On the 4th of May, 1872, the plaintiff commenced an action against the defendant, Jones, in the Lord Mayor's Court for £850 and costs, which action the defendant, Jones, caused to be removed into the Court of Exchequer, and entered an appearance therein.

On the 15th of October, 1872, the bill was filed by Job against Mrs. Potton, Mr. and Mrs. Marriott, and David Jones, stating that the agreement of the 15th of December, 1865, was made without the plaintiff's consent or knowledge; and alleging that the plaintiff did not discover the fact that such agreement had been made, or that the defendant, Jones, was getting the coals, until the month of June, 1868; that the plaintiff remonstrated and that negotiations for a compromise of the plaintiff's claim failed; that after three years had expired the plaintiff supposed that the defendant, Jones, would not exercise his power of extending his term of working, and would not continue the working, but that in May, 1872, he paid a visit to the estate and discovered that the defendant, Jones, was just completing a new arrangement with the other defendants for a letting of the mines to him for a further term of ten years; that injury had been done to the surface, and a cottage and other buildings thereon sunk and cracked, and that the acts committed by the defendants amounted to destructive waste.

The bill prayed for an inquiry as to the value of the coals gotten by the defendant, Jones, under the hereditaments, no deduction being allowed for the cost of bringing them to the surface, and that a sum equal to one third of such value be ordered to be paid to the plaintiff; further, for an account of the quantity of the coals left unworked (excluding the quantity which would be left in a proper course of mining) and of the

value of such quantity, and that a sum equal to one third of such value might be paid by the defendants, or some of them, to the plaintiff, the plaintiff undertaking to give to each of the other defendants her or his share in the coals left; and for an injunction, a receiver, and damages.

The defendant, Jones, by his answer, said the value of the coal under the hereditaments was, in his judgment, about £450. He believed the plaintiff was informed, long before June, 1868, by Mr. Roberts, that the defendant was working the coal. Since the expiration of the three years he has been in treaty for a fresh term of three years, in the expectation that the plaintiff would concur in it, but, as he did not, the treaty fell through. It was not true that great, or in the result any, injury had been done to the surface by his workings. The injury to the cottages was mainly owing to want of repair; and he had repaired the cottages, and had put them into better condition than before. The acts of the other defendants in giving him a license, and his own acts under that license, did not amount to destructive waste, but were the only means by which the coal could be saved. He had never intended, since he received the plaintiff's notice in May, 1868, to continue the working, whether he might be entitled to do so or not. Finally he pleaded the Statute of Limitations, and acquiescence, delay and *laches* on the part of the plaintiff.

In his affidavit in support of the bill, the plaintiff said that he was an equitable mortgagee of Mrs. Potton's share for £100. The coals under the estate were, before the wrongful acts of the defendant, of the value of £10,000, and he now believed them to be of the value of £6,000, at least. He had read the statement in the answer of Jones that he and Mrs. Potton and a Mr. Roberts informed him of the negotiations for such agreement, and that such statement was "wholly untrue."

Mr. Vavasor Powell, collier, one of the plaintiff's witnesses, denied that the coal could only be gotten at a profit in connection with the Wern Colliery. As to the part said to contain 6 A., 3 R., 5 P., the coal could be got to advantage by independent workings. In his judgment the coal, being seven seams, under the estate, was then worth £6,420, and was at one time worth £10,000.

There was conflicting evidence on the other side as to the value of the coals, and as to the amount and cause of damage to the buildings.

The letters showed a negotiation, in 1871, between the plaintiff and Roberts for the sale of the plaintiff's interest, which fell through. In the course of this, Mr. Job, in a letter dated the 14th of October, 1871, said he would accept an offer of £180 for his share in the estate, in consideration of Mrs. Potton's obligation to him being settled at the same time. He further offered, on the 14th of November, 1871, to transfer his mortgage to Roberts for £130, an offer which, not being accepted at the time, he afterward raised to £160.

After the institution of the suit, namely, on the 30th of December, 1874, Mrs. Potton died, and the suit was revived against her representative. Mrs. Marriott had also died, and the suit had been revived against her heir at law.

It was stated at the bar that since the institution of the suit a decree for partition of the estate had been made in another suit in this branch of the court and that a sale was in progress.

W. PEARSON, Q. C., and SIMMONS, for the plaintiff.

KAY, Q. C., and ALEXANDER, for the representative of Mrs. Potton; WILLIAMSON, for John Marriott; HERVEY, for the heir of Mrs. Marriott; LITTLE, Q. C., and HEMMING, for the defendant, Jones.

Sir JAMES BACON, V. C.

This is at least a very remarkable suit, whether the nature of it is considered, or the subject to which it relates. It is a suit in the court of chancery. I have nothing to do with the common law doctrine, so much insisted upon by Mr. Pearson, not only from the nature of the suit, but because the suit has been brought in this court, the plaintiff having deliberately elected to prefer the remedy which he can get here to any right or remedy he might have at law. I have, therefore only to consider the facts as far as they are clearly in evidence, and to consider what are the rights of tenants in common in a mine.

Now, no authority has been referred to, and I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided, always, that he does not take more than his share. The statute of Anne has recognized that principle, and every decision, which I know of, has adopted it as a principle. What difference is there between a tree growing, which the court refuses to prevent a tenant in common from cutting at his pleasure, although it is a part of the inheritance, and a tree which, by some operation of nature, has become carbonized and turned into cannel-coal? How is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal? The only restriction upon him is that he must not appropriate to himself more than his share. It is not suggested here that the original defendants, Mrs. Potton and Mr. and Mrs. Marriott, who were then the co-owners, have taken any more than their respective shares. There is no suggestion of it anywhere. The document which has been referred to, and which is called their license to work, carefully restricts the license which they give within the bounds of their own rights, and there is no difference in that respect between that which Mr. Jones has done under their license, and that which they, without license, might have done by their own hands. The principle of the case is, therefore, perfectly clear, and is not disputed. The plaintiff is tenant in common with two other persons in a mine, the shares in which are undivided. They have only exercised their rights, and they have left him, for anything that I can see, to exercise his. What he complains of is, that under their leave and license, a certain quantity of coal has been taken away in which, to the extent of the third, he is interested, and that seems to be so. But that is the whole of his case—that is, the whole of the right to relief which the plaintiff can insist upon—and that right to relief must be governed by the facts in this case. The cause has been brought on for hearing after a decree for partition has been made in another suit, from the day of the date of which decree it must be considered that the estate has been divided into three parts, one of which belongs to the plaintiff. What

bearing, therefore, those common law cases, on which Mr. Pearson has so strongly insisted, can have on the equitable relief to which the plaintiff is entitled in this court, I am unable to perceive in any degree.

The case of *Wilkinson* v. *Heygarth*, 12 Q. B. 837, which has been referred to, touches the question of leave and license, and the sublime mysteries of special pleading, the days of which are numbered. In the decision of the court there, it was held that the plea was a bad plea, because the plea was of the leave and license of only two persons, when the leave and license of more than two, perhaps of three of them, was necessary in order to justify the plea. That was the whole decision in that case; it decides nothing else in the world, and does not touch the substance of this case, nor even the substance of that case in any degree; but it decided, as a matter of special pleading, that that plea was a bad plea. This mysterious doctrine of leave and license has been very often thrust upon this court upon authority of cases in the courts of common law, of which I speak with all possible respect, not with less respect than I do of the case to which the late Lord Justice Knight Bruce was not unfrequently in the habit of referring when he was invited to consider the question of leave and license, and the imperfections which might attend it. He quoted a case, the name of which I do not know, which he often cited either from the Year Books, or some not very much less remote reports, a case of a young woman who by her next friend sued a barber for having cut her hair. He was to cut her hair, and he had cut it all off, and she brought an action against him by her next friend; and the barber pleaded leave and license. The next friend replied that the person he represented was an infant at the time and could not give leave and license, and so the court held that the plea was a bad plea, and judgment went for the next friend. That is the most remarkable case of leave and license that I recollect at this moment, but it is quite as much to the purpose as the case upon which Mr. Pearson has so much relied.

But to leave all such considerations, let us see what is the case here pleaded and proved. The plaintiff's case is that he is the owner of an undivided third of the lands in question. His allegation is that "by an agreement, dated the 15th day

of December, 1865, the defendants, Maria Potton, John Marriott and Caroline Eliza, his wife, without the consent or knowledge of the plaintiff, and without any previous notice to him, agreed to let two equal undivided third parts." The evidence upon that subject is that of Mr. Roberts, who has not been cross-examined, although there was an opportunity of doing so. In his evidence he proves, and it is uncontradicted, that on the 21st of March, 1865, he wrote to the plaintiff this letter. (His honor read the letter extracted above, and continued:) The plaintiff, in his affidavit, does not repeat that paragraph, which I have read from his bill, but he does state that he did not discover that the agreement had been made until the month of June, 1868. He says he has read the statement in the answer of David Jones, that he and the said Maria Potton and a Mr. Roberts, a surveyor, informed him of the negotiations for such agreement, that that statement was "wholly untrue." That is the way that piece of evidence is met, and upon that, in my opinion, taking into consideration what Mr. Roberts states elsewhere, Mr. Roberts must be taken to have told the truth, and the court must act upon it as a fact, that, either at the time or before the agreement of 1865 was entered into, the plaintiff was fully apprised of it. It is not necessary to go far to find satisfactory proof of that, because the correspondence, which is verified by Mr. Jones' affidavit, shows clearly that the plaintiff was perfectly acquainted with everything that had been done under the agreement. There is a letter of a later date, in which his share of the royalty is stated to him as being equal to that of Mrs. Potton, and of the third party, and that the money has been at his command ever since. The bill states in the fourth paragraph that the plaintiff did not discover the fact that the agreement had been made until on or about June, 1868; and then comes this statement in the fifth paragraph of the bill, of which there is not one particle of evidence: "After discovering the conduct of the defendants in leasing and working the said minerals, the plaintiff remonstrated with the defendant, David Jones, and threatened to take proceedings against the defendants in respect thereof, and thereupon negotiations took place for a compromise of the plaintiff's claims, but such negotiations failed." He further alleges that he "paid a visit to the said heredita-

ments in the month of May, 1872, and upon the occasion of the said visit the plaintiff discovered, to his great surprise, that the defendant, David Jones, was just completing a new arrangement with the other defendants for a letting of the said mines and minerals for a further term of ten years." This is also plainly disproved. It is not true that any working has been carried on after the termination of the agreement for three years from 1865. It is true that there was a negotiation pending at an early time, but it is equally true that there was nothing done upon that negotiation, and that because of the plaintiff's declining to be a party to it. And is there anything in the case but this, that the plaintiff, knowing very well that his two co-tenants were working the mine—for Mr. Jones' working is only their working—takes no step, remonstrates in no way, not only does not apply to this court, but does not apply to any other court, does not offer the slightest objection to what was being done during these three years, and now by his bill comes and asks that Mr. Jones, who has been only the agent of the real owners, should be charged with the share of profits that might have been made by working this colliery? If he is entitled to anything, it can only be from the day when a decree is pronounced; he can be entitled to nothing else. A person who has been standing by all this time may take his account—it is indifferent from what period he takes it—he may take the account from 1868. I think he is entitled to such an account, but I think he is entitled to no more; and I think, with respect to any costs of the suit, it would be in the highest degree unjust if I made Mr. Jones pay any costs of this suit; although, as I have said, he is answerable for such share as the plaintiff may be enabled to establish, by means of an inquiry, to be due to him; and if the plaintiff insists upon it, I will direct such an inquiry at his instance and at his risk.

Upon this subject I must say that in directing that account I can not adopt either of the rules which have been referred to in the decided cases, because this case does not resemble in its substance, elements, or nature, either of the cases to which those varying rules were applied. If a wrongdoer does an act which, if it were the case of a chattel and capable of sustaining an indictment, would amount to larceny, then the most rigorous

mode of taking the accounts is that which is adopted against him. If it has been by inadvertence, or by negligence, not culpable or tortious in any other sense, then the plaintiff is entitled to the value of the coal at the pit's mouth, allowing nothing for the mere severance, but allowing for the transport of the coal to the pit's mouth. But this is not a case in the slightest degree falling within this principle. This is a case in which, if the coal had been severed by the two co-tenants, and brought by them to the surface and then disposed of, they would have been entitled to deduct from the value, in account with their co-tenants, the cost of severance and the cost of bringing it to the pit's mouth. Mr. Jones is precisely in that position now. Mr. Jones has done nothing tortious, neither larcenous nor negligent, but in the assertion, and, as I conceive, in the exercise of a strict right, has brought this coal to the surface, has accounted to the two co-tenants for what he and they agreed was its value; and he is accountable to the plaintiff for what shall appear to be its value, but subject to those deductions. That, in my opinion, disposes of the whole of the case. I do not want to travel into the subtleties which I have listened to, not without interest, from Mr. Pearson, but which, in my judgment, have nothing whatever to do with this case, which is to be decided and dealt with in a court of equity. Here, all the co-tenants have done has been to take and enjoy that which was unquestionably theirs, although it was at that time undivided. If anybody will point out to me the way in which a co-tenant of a mine could enjoy that which is his, by any other means than that which was adopted here, I will listen to it with the greatest pleasure, and change my opinion. The conduct of the plaintiff has been, in my opinion, certainly without any explanation, and, as I think, without excuse. It is also clear that the plaintiff, who now files a bill alleging the large value of this property, and attempts to prove by his witness that the coal under it was worth £10,000, and is now worth £6,000, was ready to sell it for £180; and I can not add the £160 to make up the price—it was a totally different transaction. The plaintiff said to Mrs. Potton: "Your husband owed me £160; if you will pay me your debt, I will sell mine for £180." That is not selling "my mine" for £340; it is a plain unqualified suggestion, as far as it goes, that the £180 was the

whole value to a purchaser of the thing which Mr. Job had to sell at that time.

To the proceedings in the common law courts I have already adverted. In the proceedings in this court there has been no application for an injunction, and no such application could at any time have been successful. That there can be none now is obvious, because there has been a decree in a partition suit; but if the present plaintiff—I suppose a defendant in that suit—had any such case as he suggests upon this record, I ask why he did not bring that forward in the partition suit, and say, "In making a decree for partition you must take into consideration that my other two co-owners carried away a part of the inheritance."

(Mr. Pearson observed that the point was very strenuously argued.)

I suppose, then, that I thought there was no proof of the fact. However, that is all over, and it has very little to do with the present case. All I can do in this case is to deal with this record. I find persons made parties to the suit whom the plaintiff says it was necessary for his interest to make parties to it. Very well; as he says so, and as they make no claim; as they, in my judgment, or the persons they represent, have done nothing which they were not entitled to do; as no account is asked against them at the bar, and they are not accountable, in my opinion, the plaintiff must pay their costs of the suit up to the hearing, and, if he likes, they may then be dismissed. All the decree can do besides, is to direct an account of the coal which has been gotten by Mr. Jones; of the value of that coal—making to him all just allowances, including especially the cost of severing the coal and the cost of bringing it up to the pit's mouth; and for one third of that, the plaintiff, being bound by no agreement, will be entitled to claim payment from Mr. Jones. I have already said I shall give no costs against Mr. Jones up to the hearing. The costs afterward will of necessity be reserved; and, although I have not gone into it at any great length, I desire it to be understood that I proceed upon the evidence in the case as it stands, namely: on the one hand, the discrepant evidence between the plaintiff and Mr. Vavasor Powell; and on the other hand, the plain evidence on the part of the defendant Jones and his

witness, Roberts, a person, from his employment, entitled to be listened to when he is speaking on such a subject as a coal mine, and who, as I have said, has not been cross-examined. But I give him no costs, because, although I do not blame him, he chose to go on without the authority and consent of the plaintiff. The subsequent costs will, of necessity, be reserved.

There only remains to be mentioned the subject of the damage which the surface is said to have sustained. On both sides it is agreed that that damage, whatever it was, was occasioned by the working. The working was a lawful thing, and the damage, if done, ought to have been repaired. It is in evidence distinctly, not only that such damage was occasioned by the proper working, but that it has been effectually repaired, and that the cottage said to have had a cracked wall is now a better cottage, by a great deal, then it was before. Upon that subject, therefore, in my opinion, no further observations need be made.

The following are minutes of the order:

Inquire what coals have been worked and gotten by the defendant, David Jones, from the mines under the Allsop estate in the pleadings mentioned, and what was the market value thereof at the pit's mouth, and what were the costs incurred by the said defendant in getting and severing the coal and bringing it to the pit's mouth, and deduct the amount of such costs from the amount of such value, and order the defendant Jones to pay to the plaintiff one third part of the amount of such value after such deduction; no costs of suit as between the plaintiff and the defendant Jones.

The plaintiff electing not to keep the other defendants before the court for the purposes of such inquiry, dismiss the bill with costs as to them; but only one set of costs is to be allowed to the defendants, representing each of the two undivided third parts of the estate.

CLARK v. JONES.

(49 California, 619. Supreme Court, 1875.)

[1] **Same person tenant in common under adverse titles.** Where there were two companies or sets of claimants asserting title to a lot of tailings deposited on certain ground and a party who was interested, as a tenant in common, in both titles, received and accounted for the profits of the tailings as a member of one of the companies, it was *held*, that he could not be called to account by a member of the other company *as a tenant in common* with him.

Appeal from the District Court, Fourteenth Judicial District, County of Placer.

The plaintiff, Anthony Clark, and J. M. Minor, R. Winspear, and defendant, Jones, were the owners, as tenants in common, of a tract of mining ground, at Forest Hill, Placer county, called the Dardanelles Mining Claims. Defendant, Jones, Adam McDonald, Benjamin Rowe and Ann Corcoran, were the owners as tenants in common of an adjoining tract of mining ground, called the Oro Claims. The first named was called the Dardanelles Company, and the second named was called the Oro Company. On the 30th of September, 1869, the members of the Dardanelles Company leased to the members of the Oro Company their mining claims, including a canon leading from the claim down the side of the mountain to the river, through which they had been accustomed to wash their gold-bearing earth. Jones was, as a tenant in common in each company, both one of the lessors and one of the lessees. Jones owned a controlling interest in the Oro Company, and was its superintendent. He, as such superintendent and on behalf of the Oro Company, sold to a company of Chinamen the gold-bearing tailings in the canon, and received $1,900 therefor. The sale was made and the Chinamen worked out the tailings, and took therefrom about $1,900 in gold dust, after the lease had expired. Jones accounted to the Oro Company for the sum he thus received. Jones owned two and one half fifteenths of the Dardanelles Claims and the plaintiff six and one half

[1] No fiduciary relation after claim becomes hostile: *420 Mining Co.* v. *Bullion Co.*, 11 M. R. 608.

fifteenths, and Minor three and one half fifteenths, and Winspear two and one half fifteenths. Minor and Winspear assigned to the plaintiff, who brought this action to recover twelve and one half fifteenths of the money Jones received from the Chinamen, and twelve and one half fifteenths of certain other sums which Jones had collected from persons who owed the Dardanelles Company. The theory of the plaintiff was that at the expiration of the lease the tailings belonged to the Dardanelles Company; and that as Jones, as a tenant in common in the Dardanelles Company, had realized the money from its property, that he was liable to the other tenants in common for their proportions of the sums he had received. The plaintiff had judgment, and the defendant appealed.

HALE & CRAIG, for the appellant.

It appears from the findings that defendant Jones neither asserted nor exercised any individual rights in the premises, but that his acts were on behalf of the Oro Company.

B. F. MYERS and C. A. TUTTLE, for the respondent.

Jones and others not being a corporation, we had the right to proceed against Jones alone.

BY THE COURT.

The defendant in the transaction with the Chinamen acted not as a member of the Dardanelles Company, but as a member of the Oro Company, upon the books of which latter company the $1,900 were entered and accounted for as received for that company. Under these circumstances the action against Jones, as sustaining the relation of tenant in common with the plaintiff, can not be maintained.

Judgment and order denying a new trial reversed and cause remanded. Remittitur forthwith.

FRISBEE'S APPEAL. FRISBEE v. IRVIN ET AL.

(88 Pennsylvania State, 144. Supreme Court, 1878.)

[1] **No account in favor of ousted co-tenant till title settled.** A court of equity has no jurisdiction of a bill for an account of profits brought by one out of possession, who claims to be joint owner in an oil well, against his alleged co-tenants, until the question of title is first determined in a court of law.

Appeal from the Court of Common Pleas of Butler County. In Equity.

This was a bill in equity filed by J. C. Frisbee, which, in substance, set forth that on May 6, 1873, John Hemphill owned in fee seventy-five acres of land in Butler county which, on that day, he conveyed by deed of general warranty to J. C. McKinney; that on June 25, 1873, McKinney, by articles of agreement, leased a portion of said tract to D. C. Scott; that on August 13, 1873, Scott, by articles of agreement, sold to Frisbee one fourth interest in said lease, with an oil well and fixtures thereon, of which one fourth complainant took possession, enjoying the profits thereof until October 28, 1874; that upon that day the interest of Scott in the well and lease aforesaid, was sold at sheriff's sale and purchased by the defendants, R. L. Irvin and Samuel P. Alexander and ——— Brown, partners as Brown Brothers & Irvin; that previous to and at the time of sale complainant gave notice that he owned the one fourth of said well and lease; that shortly after complainant went into possession of his fourth interest in 1873, the oil commenced to flow at the rate of about two hundred and fifty barrels per day, and continued to produce largely until the day of the sheriff's sale, at which date said well was producing fifty or more barrels daily, and continued to produce at the same rate until the filing of the bill; that at the time of the sheriff's sale complainant held his undivided one-fourth interest in said well and is entitled to his share of the oil therefrom; that defendants refused to recognize complainant as part owner of said leasehold and oil well, and

[1] *Clark* v. *Jones*, 14 M. R. 342; *North Pa. Co.* v. *Snowden*, Id. 294.

unjustly deprived him of his share of the oil; that complainant has always been willing to contribute to the expenses of running said well, but defendants gave him no notice of what would be required, and refused to recognize his title to contribute; and that defendants have not accounted for complainant's share of the oil and refuse to account. The bill then prayed that defendants should be required to account to complainant for one fourth of the oil produced; that they be restrained from receiving this one fourth of said oil or from making any sale of oil that would affect complainant's rights.

The defendants answered admitting that a sale was made by Scott to Frisbee, but claiming that the interest thus sold was reconveyed to Scott by Frisbee, some time during the spring of 1874, probably during the month of April; denying that Frisbee had possession of said lease or well and received the profit accruing therefrom up to October 28, 1874, as alleged, but admitting that said Frisbee may have received his portion of the said profits up to the time that the interest was re-sold to said Scott; averring that the interest of Scott was sold at sheriff's sale on the 28th of October, 1874, upon a judgment of R. L. Irvin and Samuel Q. Brown, partners, as Samuel Q. Brown & Irvin, and not by the parties whose names are recited in this bill, and that the interest of Scott was purchased at said sale by said Samuel Q. Brown & Irvin, who answer the plaintiff's bill and claim to be the owners of said interest and of the working interest in said well, lease, machinery, fixtures, etc.; that no notice of claim of said Frisbee in said property was given to defendants prior to said day of sale, as alleged. Defendants do not know what the daily production of said well was prior to said sale, but that since that time it has not averaged above twenty-five barrels per day, and that the well aforesaid has been diligently worked; that the production of said well prior to said sale can be readily ascertained from the books of the pipe companies; that complainant, at the time of the sheriff's sale, did not own an interest in said leasehold and oil well, and that defendants did not unjustly deprive complainant of his share therein as they did not recognize him as the owner thereof, and therefore did not give him notice in regard to the expenses or account for the proceeds of the well. The bill and answer were referred to a

master to take testimony and report, and before any testimony was taken the defendants' counsel requested the master to report to the court without taking any testimony, recommending a dismissal of the plaintiff's bill for want of jurisdiction. The motion was argued at a time fixed by the master. The defendants in their pleadings did not plead to the jurisdiction, but answered the bill. The master reported that while it was not too late to plead to the jurisdiction of the court, yet he was of the opinion that it was not within his province to pass upon the question.

After the testimony was taken and the same reviewed, the master made a further report, recommending a decree that the defendants account for one fourth of the oil produced, and that they should be restrained from receiving one fourth of the production thereafter.

The defendants filed a number of exceptions to the report of the master, the first being as follows:

"That a dismissal of the plaintiff's bill should have been recommended in his report, on the ground that sufficient reasons or grievances are not alleged and set forth in said bill to give a court of equity jurisdiction, the chief question raised by the bill being one of title, which question should have been settled by ejectment at law and not in equity. To sustain such bill, answered as it has been, would be to interfere with the right of trial by jury."

The master overruled the exceptions, but the court sustained them and dismissed the plaintiff's bill with costs. From this decree this appeal was taken.

McCANDLESS & GREER, for plaintiff in error.

McJUNKIN & CAMPBELL, for appellees.

Mr. Justice SHARSWOOD delivered the opinion of the court.

It is unquestionably true that the courts of common pleas, by the act of October 13, 1840, Pamph. L. 7, have all the powers and jurisdiction of courts of chancery in settling partnership accounts and such other accounts and claims, as by the common law and usages of this commonwealth have

heretofore been settled by account-render. These words are broad enough to include accounts between tenants in common, though this remedy was first given to them by statute 4 Anne, c. 16, Sec. 27, reported by the judges to be in force in this State: 3 Binn. 625. It seems, however, very well settled that account will not lie against a disseizor or other wrongdoer. To maintain an action of account, said Lord Coke, before the statute, there must be either a privity in deed by the consent of the party, for against a disseizor or other wrongdoer no account doth lie, or a privity in law *ex provisione legis*, made by the law as against a guardian: Co. Litt. 172 a. So, if a joint tenant takes all the profits to his own use, account will not lie: 1 Rol. 117, l. 30. At common law, indeed, no action of account lay by one tenant in common against another, unless the latter had been specially constituted the bailiff of the other: Co. Litt. 172 a. This the statute was intended to remedy: 2 Bl. Com. 194. Yet, there is nothing which would seem to change the well settled rule, that one out of possession has no right to an account against the tenant holding adversely, whether the plaintiff claim the whole or a part. Such an action is not the proper action for trying title. The same principle has been recognized in equity. In *Tilly* v. *Bridges*, Prec. Ch. 252, it was held, that when one has title to the possession of land, and makes an entry whereby he becomes entitled to recover damages at law for the time the possession was detained from him after such entry, he shall not turn that suit at law into a suit of equity and bring a bill for an account of the profits, except in case of an infant or some very particular circumstances. So in *Norton* v. *Frecker*, 1 Atk. 524, Lord Hardwicke said: "The proceedings in equity are the same as at law where trespass will not lie for mesne profits till the possession is recovered by ejectment." So in *Sayer* v. *Pierce*, 1 Ves. Sr. 232, where an account of the profits of coal mines was not decreed, but the bill was retained with liberty to bring ejectment, but that was because there was a prayer to ascertain boundaries, and the plaintiff, if he recovered in ejectment, might want that relief. See, also, 1 Story's Eq. Jur. § 511. The question, however, has been put at rest in this State by the *North Pennsylvania Coal Co.* v. *Snowden*, 6 Wright, 488, where it was held that a court of equity has no jurisdiction of a bill brought by one

tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges, founded on legal title, until those rights have been established at law. "It has never been held," says Mr. Justice Strong, "that equity courts have jurisdiction of actions founded on legal title, brought by one tenant in common against an alleged co-tenant to obtain possession or enjoyment of land." See, also, *Norris' Appeal*, 14 P. F. Smith, 275; *Tillmes* v. *Marsh*, 17 Id. 507; *Christie & Scott's Appeal*, 4 Norris, 465. That there was in this case an ouster of the plaintiff by the defendants, on the 28th day of October, 1874, by the sheriff's sale on that day, is substantially admitted by the bill. Certain it is that the plaintiff deemed it necessary then to give notice of his claim. Since then the defendants have refused to recognize his title; he so alleges in his bill. We think, in every view of the case, the decree of the court below was right.

Decree affirmed, and appeal dismissed at the costs of the appellant.

BRONSON v. LANE ET AL.

(91 Pennsylvania State, 153. Supreme Court, 1879.)

Tenants in common of oil with right to surface—[1] Exclusive use of surface by mineral owner with right to subdivide. By four separate deeds B granted to C, for ninety-nine years, two tenth parts of the oil and mineral rights, excepting lead ore, in certain land; to D three tenths, to E two tenths and to F three tenths. There was no reservation or exception save the lead ore. There was also an express grant of the right to enter and bore for oil, free right of ingress and egress, the right to erect derricks and other necessary structures, and to use the timber: *Held*, that the grantees were tenants in common, with the exclusive right to all the oil for ninety-nine years; that there was an express grant of exclusive occupation of so much of the land as was necessary for the enjoyment of the thing granted; and that the grantees had the right to divide the land into small tracts and lease the same, with the right to the lessees to enter upon such tracts for the purpose of taking oil therefrom.

A disclaimer affects only the question of costs.

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[1] *Marvin* v. *Brewster Co.*, 13 M. R. 40; note 7, 13 M. R. 258.

Effect of sheriff's return in Pennsylvania practice as proof of ouster. In ejectment the sheriff returned the writ as "served" upon the defendants and the latter pleaded "not guilty," but at the trial proved that what they possessed they rightfully possessed under the grant, and as to the residue disproved possession. *Held*, that the *prima facies* of the sheriff's return was thus rebutted; that the plaintiff's claim was for the whole, and defendants had a right to a general verdict.

[1] **Extent of ground held under judgment, shown in parol.** The verdict and judgment did not establish title to the whole surface. It is always competent to establish by parol evidence, where it does not contradict the record, what the extent of the claim was upon which there has been a recovery.

Error to the Court of Common Pleas of McKean County.

Ejectment for a tract of land in McKean county, brought by William W. Bronson against R. T. Lane and others. The writ was returned "served" on the defendants who pleaded "not guilty."

Bradford I. Taylor being seized in fee simple of two tracts or parcels of land situate in McKean county, Pennsylvania, the one containing 1,230 49-100 acres, and the other 97 52-100 acres, he and his wife executed four deeds, all dated the 1st day of March, 1876, by one of which deeds it is witnessed that the said Taylor and wife, the parties of the first part thereto, in consideration of the sum of $3,984, received from Frederick Prentice, of the city of New York, of the second part, "have granted, sold, aliened, enfeoffed, released and confirmed, and by these presents do grant, sell, alien, enfeoff, release and confirm unto the said party of the second part hereto, his heirs and assigns, the undivided two-tenths part of the oil and mineral right, saving and excepting lead ore, of, in and to," the two above mentioned tracts of land, describing the same by metes and bounds. "Together with the right to enter upon the said premises to dig or bore for oil or other minerals saving and excepting lead ore; free right of ingress and egress, the right to erect such and so many derricks and engine houses and other structures as may be needed in the legitimate business of prospecting for, producing and transporting oil or other minerals, the right to use so much of the timber growing upon the said land as may be needed for fuel in operating

[1] *Campbell* v. *Rankin*, 12 M. R. 257.

the same, and such timber as may be required for the erection of derricks and engine houses upon the same. The right hereby conveyed and the privileges herein annexed to continue for a term of ninety-nine years from the date hereof and then to revert to the grantor herein, his heirs or assigns. To have and to hold the mineral right hereby granted, with the privileges unto the said party of the second part hereto, his heirs and assigns, to and for the only proper use of the party of the second part hereto, his heirs and assigns, for the term herein granted. And the said Taylor and wife, their heirs and executors, covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they will warrant and defend the said oil and mineral right against all persons whomsoever lawfully claiming the same, for the term of years and purposes herein granted or mentioned. Reserving to the said first party herein the right to enter upon said land for the purpose of tillage, except so far as they may be needed for the purposes of this grant. Also, reserving the timber not herein conveyed, and the right to enter and remove the same. Generally reserving all rights not specifically conveyed."

By another of the said deeds, Taylor and wife, for the consideration of $5,976, received from Stillman L. Wilson, of Connecticut, granted to him the undivided three-tenths part of the same oil and mineral right, and by another of said deeds, for the consideration of $3,984, received of Charles S. Whitney, of McKean county, granted to him the undivided two-tenths part of the same oil land and mineral right; and by the other deed, in consideration of $5,976, received from Lewis Emery, Jr., of McKean county, granted to him three-tenths part of the same oil and mineral right—the three deeds to Wilson, Whitney and Emery respectively, being each in form and phraseology identical in all material parts, excepting as above mentioned.

By his deed dated the first day of June, 1877, Frederick Prentice conveyed to the Producers' Consolidated Land and Petroleum Company, one undivided fifth part of a tract of land called the Mack tract, which embraces, it is said, the lands described in the deeds of Bradford I. Taylor, before mentioned, and it was admitted on the trial that Stillman L. Wilson conveyed whatever rights he obtained by his deed to

Lewis Emery, Jr., and that he, Lewis Emery, Jr., made a conveyance to John Eaton for the undivided two-tenths part of the land in question, and also made a deed purporting to convey three-twentieth parts of the right to C. S. Whitney & Son.

These parties claiming under the aforesaid deeds of Taylor and wife, treated and dealt with the land as if they were owners of the soil. They had it all surveyed off into small lots, containing about twenty acres each, and leased these lots from time to time to different persons for terms of twenty years, reserving as rent from each person or firm to whom they rented a lot or lots, a specified portion of the oil obtained.

By their deed dated the 7th of March, 1878, Taylor and wife conveyed the said tract of 1,230.49 acres to William W. Bronson, in fee simple for the consideration of $6,100; this last mentioned deed containing the following clause, viz.: "This conveyance, however, is made subject to all the rights and privileges granted by the party of the first part to Frederick Prentice, Stillman L. Wilson, Charles S. Whitney and Lewis Emery, Jr. by four several conveyances bearing date the first day of March, 1876."

Bronson, finding that he was entirely excluded from the land he had bought by the tenants of the parties claiming under the four deeds of the 1st of March, 1876, on the 6th of June, 1878, issued a writ of ejectment for 297½ acres, part of the tract of 1,230.49 acres, against the persons he found in possession of that part of the land, and afterward Lewis Emery, Jr., C. S. Whitney, H. P. Whitney, Fredrick Wheeler, John Eaton, and the Producers' Consolidated Land and Petroleum Company, claiming to be the landlords of these defendants, applied to the court below to be, and thereupon were, made co-defendants in the action, and permitted to defend as landlords; and on the trial the defendants gave in evidence the leases made by said landlords of parts of the land claimed by plaintiff in this action.

The plaintiff submitted the following points:

1. That the four deeds of Taylor and wife to Prentice, Wilson, Whitney and Emery respectively, each dated the first day of March, 1876, together, grant but a joint license to the said Prentice, Wilson, Whitney and Emery to take oils and

minerals other than lead ore, for the term of ninety-nine years.

2. That said deeds, together or separately, grant no right or power to the said grantees, or to their assigns, or to any of them, to divide the land into parcels and lease the parcels to different persons, with the right to enter upon such different parcels of the land for the purpose of gaining and taking oil therefrom, or to possess the said several parcels, or any of them, by the tenants or licensees of the said grantees or of their assigns.

3. That all the leases given in evidence by the defendants were made by the lessors, who had no right to make such leases, and that the entry of each lessee on that part of the land leased to him by the said lessors operated as a disseizin of the plaintiff as to the whole of such part so leased, and that under all the evidence in this cause, the verdict of the jury ought to be in favor of the plaintiff for all the land described in the writ of ejectment.

The court, WILLIAMS, P. J., declined to affirm these points and in the general charge, *inter alia*, said:

"This is an action of ejectment by means of which the plaintiff seeks to recover the possession of about three hundred acres of land in Bradford township. He shows a title in himself in fee simple. The sheriff's return is by an Act of Assembly made evidence, *prima facie*, that the defendants are in the actual adverse possession of the land described in the writ. If the case had ended here the plaintiff would have been entitled to your verdict.

"The defendants by way of reply allege that they have at no time held or claimed the right to hold possession of the said land or any part of it except for the single purpose of procuring oil. In the effort to procure oil they allege that they have at no time occupied any portion of this land not actually necessary for the proper prosecution of the work of drilling for, taking and transporting oil. This possession they allege they have a legal right to take and hold by virtue of the several deeds from B. I. Taylor and wife for the 'oil and mineral right,' which have been given in evidence.

"This fully meets the plaintiff's case. It denies any general possession, such as the writ charges and its service

establishes, *prima facie*. It admits a limited possession for a particular purpose, and justifies it. Upon both points the evidence is satisfactory and wholly uncontradicted.

"But the plaintiff asks us to give you instructions upon certain points which would result in the withdrawal of the case from you and the determination of the validity of the defendant's title by the court. We decline to affirm these points. On the contrary, we hold that the several deeds of Taylor and wife, dated March 1, 1876, under which the defendants claim, did pass to the grantees named therein, respectively, an interest in land; that such interest is not to be held in common with the grantor, but is exclusive of him and all claiming under him, and that the division of the surface into lots, and the letting of these lots to different persons, to be by them operated separately for oil, does not work a forfeiture of the rights of the grantees of said Taylor.

"These rulings leave no question whatever, for the determination of the jury. They place the case very squarely on the real questions in it. As the necessary result of these views, we now say to you, that under the uncontradicted evidence in the case, your verdict should be in favor of the defendants."

The verdict was for defendants accordingly, when plaintiff took this writ, and alleged that the court erred in refusing the plaintiff's points and in charging as above noted.

DAVID STERRETT and JOSHUA W. COMLY, for plaintiff in error.

WM. D. BROWN, A. G. OLMSTEAD and GEO. A. BERRY, for defendants in error.

Chief Justice SHARSWOOD delivered the opinion of the court, October 6, 1879.

The argument in this case took a wide range, embracing many topics of great interest and importance, which, however, we do not deem it necessary to consider. In the view which we take the questions involved lie in a very narrow compass. There can be no doubt, we think, upon the true con-

struction of the four deeds from Taylor and wife to the several grantees, under whom the defendants below showed title, that the exclusive right to all the oil in the land described passed to them for the term of ninety-nine years. To Prentice was granted "two tenth parts of the oil and mineral right, saving and excepting lead ore;" to Wilson "three tenths;" to Whitney "two tenths;" to Emery "three tenths." There is no reservation or exception of any part of the oil and mineral rights to the grantor, except the lead ore. Under these deeds the grantees were tenants in common. They were not mere grants of an incorporeal right to dig, and take in common with the grantor to which the principle of *Lord Mountjoy's case* applies. There was also expressly granted "the right to enter upon the said premises to dig or bore for oil or other minerals, saving and excepting lead ore; free right of ingress and egress, the right to erect such and so many derricks and engine houses and other structures, as may be needed in the legitimate business of prospecting for, producing and transporting oil or other minerals, the right to use so much of the timber growing upon the said land as may be needed for fuel in operating the same, and such timber as may be required for the erection of derricks and engine houses upon the same." Very plainly then, there is an express grant of exclusive occupation of so much of the land as was necessary for the enjoyment of the thing granted. It has been objected that upon so broad a construction the grantees might sink a well on every acre of the land and thus effectually deprive the grantor of the entire surface. This might be so—but practically it was in the highest degree improbable. The grantor evidently had no such fear, and if he had should have provided against it by limiting the number of wells or the surface space to be appropriated.

We have failed to discover any evidence sufficient to be submitted to the jury which showed possession by the defendants more than under their deeds they had a right to have. The instruction of the learned judge on this subject was entirely right. Much stress was laid in the argument on the fact that there was no disclaimer by the defendants of right to any part of the surface. No point as to this seems to have been made on the trial. But disclaimer is never necessary,

though it may sometimes be advantageous to defendants as regards costs. The plea in ejectment by the act of 1807 is "not guilty." The defendants proved that whatever they possessed, they did rightfully possess under their grants and as to the residue disproved possession; thus the *prima facies* of the sheriff's return was met and rebutted. The plaintiff's claim was for the whole, and defendants had a right to a general verdict: *Bratton* v. *Mitchell*, 5 Watts, 70; *Zeigler* v. *Fisher*, 3 Barr, 365; *McCanna* v. *Johnston*, 7 Harris, 434; *Tripner* v. *Abrahams*, 11 Wright, 230. The verdict and judgment did not establish title to the entire surface. It is always competent to show by parol evidence, where it does not contradict the record, what the extent of the claim was upon which there had been a recovery: *Coleman's App.*, 12 P. F. Smith, 252.

Judgment affirmed.

1. Several tenants in common of mines, owning unequal interests, uniting in a joint lease, the covenants are joint and not several, and suit for breach of covenant must be brought by all, or the survivors, and this though the demise was according to their respective interests, and the rents were to be rendered according to their respective interests: *Bradburne* v. *Botfield*, 14 M. & W. 559.

2. Necessary parties to suit for partition between tenants in common: *Canfield* v. *Ford*, 11 M. R. 201.

3. One tenant in common not estopped by the representations of his co-tenant as to the extent of a ledge of lime rock: *Dexter Co.* v. *Dexter*, 4 M. R. 291.

4. Conveyance of easement by one tenant in common inoperative as to his co-tenants: *Hartford Co.* v. *Miller*, 3 M. R. 353.

5. Sale of oil by tenant in common of oil well at less than agreed price: *Mason* v. *Norris*, 11 M. R. 140.

6. An action by one tenant in common against his co-tenant for waste in digging and carrying away marl can not be maintained: *Smith* v. *Sharpe*, Busbee's Law (N. C.), 91.

7. Agreement between tenants in common as to the disposition of iron ore, *held* not to affect their relation as tenants in common of copper ore subsequently discovered: *Blewett* v. *Coleman*, 11 M. R. 160.

8. An action may be maintained by one tenant in common of a water ditch against his co-tenant for his share of the rents and profits: *Abel* v. *Love*, 11 M. R. 350.

9. In a conveyance by one tenant in common of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted is void: *Adam* v. *Briggs Iron Co.*, 13 M. R. 225.

10. For the distinction between tenancies in common and co-partnerships, see *Bradley* v. *Harkness*, 11 M. R. 389; *Gore* v. *McBrayer*, 1 M. R. 645; *Smith* v. *Cooley*, 65 Cal. 46.

11. For the measure of damages for ore taken when one tenant in common recovers in ejectment against another, see *Clowser* v. *Joplin M. Co.*, 10 M. R. 322.

12. The right to partition an incident of tenancies in common: *Coleman* v. *Coleman*, 11 M. R. 183; *Bradley* v. *Harkness*, *supra;* see also *Hughes* v. *Devlin*, 12 M. R. 241.

13. Tenants in common of a mine who are working the same, are partners: *Dougherty* v. *Creary*, 1 M. R. 35.

14. A purchase by one tenant in common of the interest of another does not inure to the benefit of the remaining co-tenants: *First Nat. Bank* v. *Bissell*, 11 M. R. 546.

15. What constitutes "control" of the mine: *Grant* v. *Parker*, 115 U. S. 51.

16. Tenants in common may sue jointly to recover possession of several undivided interests: *Goller* v. *Fett*, 11 M. R. 171.

17. The possession of one tenant in common inures to the benefit of all until the possession becomes adverse: *Mallett* v. *Uncle Sam Co.*, 1 M. R. 17; *Waring* v. *Crow*, 5 M. R. 204.

18. Tenant in common in actual possession may maintain action against co-tenant to quiet title: *Ross* v. *Heintzen*, 12 M. R. 483.

19. One tenant in common of a mining claim may recover the whole claim in ejectment against a mere trespasser: *Rowe* v. *Bacigalluppi*, 5 M. R. 237; *Brown* v. *Warren*, 16 Nev. 229; *Weese* v. *Barker*, 2 Pac. 919; *Hopkins* v. *Noyes*, 4 Mont. 550.

20. One tenant in common has no lien against the interest of his co-tenant in the estate for his share of rents collected by the latter: *Stenger* v. *Edwards*, 9 M. R. 368.

21. Ouster and adverse possession by co-tenant against co-tenant as a result of the exclusive retention of profits for many years: *Susquehanna R. R. Co.* v. *Quick*, 1 M. R. 201.

22. Holder of the mining right not a co-tenant with the surface owner: *Smith* v. *Cooley*, 65 Cal. 46.

23. Co-tenant of plaintiff not a necessary party to action for diverting water: *Himes* v. *Johnson*, 61 Cal. 259.

24. Amendment may be made by adding co-tenants as parties: *Weese* v. *Barker*, 2 Pac. 919; 7 Colo. 178.

25. The possession of a co-tenant to become adverse, must be with notice, express or constructive, to the others; but the claim of one who always averred himself to be sole owner is adverse to one claiming to be his co-tenant: *Abernathie* v. *Con. Va. Co.*, 16 Nev. 261.

26. A tenant in common who holds to exclusion is bound to account either for rental value or profits: *Edsall* v. *Merrill*, 37 N. J. Eq. 114.

27. No action for contribution except upon agreement to contribute: *Neuman* v. *Dreifurst*, 9 Colo. 228.

28 Any co-tenant has the right to possession, but not to exclusion of his co-owners: *Morganstern* v. *Thrift*, 66 Cal. 577.

29. Possession by one co-tenant is possession by all: *Southmayd* v. *Southmayd*, 4 Mont. 100.

30. Single co-tenant may work without being chargeable with waste: *McCord* v. *Oakland Q. Co.*, 64 Cal. 134; 49 Am. R. 686.

31. If a co-tenant can be called upon to account for profits he must be allowed all proper expenditures: *Id.*

CLAVERING v. CLAVERING.

(2 P. Williams, 388; Mosely, 219; Sel. Ch. Ca. 79; Machnaghten's Sel. Ca. 221; 2 Eq. Ca. Ab. 589. High Court of Chancery, 1726.)

[1] **Opening new pits.** Tenant for life of coal mines may open new pits or shafts for the working of the old vein of coals.

[2] **Injury wrought by stopping colliery.** Hazardous to grant an injunction to stay the working of a coal mine.

[3] **Remainderman may work opened mines.** One seized of lands wherein there are coal mines not opened, settles the lands on A in tail, remainder to B for life. A opens the mines, works them, and dies without issue; B may continue working in all mines lawfully opened.

The defendant was tenant for life of lands in Durham, but not without impeachment of waste; the plaintiff was the remainderman in tail, and in these lands there were several mines of coals,] which were open before the defendant, the tenant for life, came to the estate, and the tenant for life opened the earth in several places, but (as it was said) with design only to pursue the old vein of coals. And the plaintiff moved for an injunction to stay the defendant from opening the earth in any new place.

LORD CHANCELLOR (KING).—This was determined in the great cause of *Hellier* v. *Twiford*, in which I was of counsel. The matter was tried at the assizes in Devonshire before Mr. Justice Powel, and held great part of the day; there it was proved by witnesses to be the course of the country, and a practice well known in those parts among the miners, that any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein; and that otherwise the working in the same mines would be impracticable, because the miners would be choked for want of air, if new holes should not be continually opened to let the air in to them; and the same vein of coal frequently runs a great way, and (as Lord Chancellor expressed it) the same mine of coals was very knowable and easy to be discerned; besides, that to stop the working might be the ruin of the colliery forever; and

[1] *Spencer* v. *Scurr*, 10 M. R. 388.

[2] *Real del Monte Co.* v. *Pond Co.*, 7 M. R. 452.

[3] *Irwin* v. *Covode*, 15 M. R. —

in the present case it appeared that there was a fire engine kept by the tenant for life of these mines, which carried off the water, without which the mines would be lost, and the working of this fire engine cost £40 or £50 a week.

Then it was objected by the attorney-general, that these mines were not opened when the settlement was made, having been opened by the person who by that settlement claimed an estate tail, and was since dead without issue, whereas the settlement gave only the benefit of the mines then opened to the tenant for life.

Sed per cur.: It seems as if the tenant for life may work all mines which were lawfully opened by the precedent tenant in tail, though subsequent to the settlement.

So deny the injunction.

BASSET v. BASSET.

(Ambler (appendix) 843. High Court of Chancery, 1774.)

[1] **When royalty goes to remainderman.** Toll reserved on a lease of a mine made by tenant for life under a power, will go to the remainderman.

Reservation in lease descends to remainderman. If tenant for life, without impeachment, make lease for twenty-one years, reserving power to enter and cut timber, he may enter, and the timber, if cut, becomes part of his personal estate, but his personal representative can not enter after his death; the power devolves on the remainderman.

LORD CHANCELLOR (HARDWICKE).—The third point is made the principal one between the parties, and is this: John Pendarves Basset, being, by his marriage settlement, tenant for life of the Dalkeith mines, consisting of both tin and copper, with power of making leases, in possession, for such time and in such manner, and for such tolls, rents, reservations, agreements and considerations, as are usual in the county of Cornwall, such tolls and duties to be answered and paid to such persons as shall be next in reversion or remainder, of the premises in which the mines are. Mr. Basset, in pursuance of his power, makes a lease of the Dalkeith mine, reserving to himself, and his heirs and assigns, one-sixth part or toll of all such tin and copper

[1] *McDowell* v. *Hendrix*, 9 M. R. 96; *Campbell* v. *Leach*, Amb. 748.

ore as should be dug out. The lease of the copper mines was made for twenty-one years, and of the tin forever, according to the custom of the county of Cornwall. After this, there is a proviso in the deed upon which the question arises: "Provided always, and it is the agreement of the parties, that it shall be lawful for Mr. Basset, his heirs and assigns, at his or their will and pleasure, upon notice, to take up one other sixth part or share of the adventure, any time during the term, paying the sixth part of the costs and expenses that the lessees have been put unto at that time, and also the future expenses they be at in working the said mine;" and this other sixth part or share is, in the language of that county of Cornwall, called *a pleasure dole.* Mr. Basset, the lessor, has devised to the defendant, his brother, all his adventure or share of adventure, in the mine, called Pooke Haddit, and all other my adventure, or shares of my adventures of tin and copper, and all his tin bonds, or share of tin bonds, and upon this part of the case, two questions were made: First, whether this pleasure dole was devisable by Mr. Basset, and, secondly, if it was, whether he had devised it, or intended to devise it.

This will depend upon two questions: First, whether this dole is such an interest in Mr. Pendarves Basset, as he could devise to his brother. Secondly, if such, whether the words of the will comprise it. And I am of opinion he had not power to devise it, but the consideration of it will depend upon two things: First, the nature of his power, liberty or right, in the dole itself; and second, the terms made use of, and the construction of the lease in question. As to the nature of the dole, that depends upon the power, and the lease made in pursuance of it. And I am of opinion that every reservation, toll, duty, etc., made by the lease, under the power, is to go beneficially, for the landlords; and, by the power, must be such as will go to the remainderman or reversioner, and not to the executors, or administrators, or heirs general (of the lessor), for to such purpose are the express words of the power. But, it is said, here are sufficient to answer the power, by reserving a sixth clear share of the ore; but I can not think so, nor does it appear to me, from any proof, that said sixth share of the ore is the only usual and customary reservation upon leases of mines in Cornwall. And the words of the power require all customary toll and

duties, etc., to be reserved. What duties are reserved, besides the toll and sixth share, unless it be the pleasure dole? Therefore, according to the terms of this power, the lease could not be made otherwise than by reserving things of this kind to the remainderman. And there is a material thing arises, upon the expression of this dole; the county knew it, and by the name of a pleasure dole; and there is no custom appears to fix it to a sixth share of the adventure, but its name rather shows that it may be varied, and perhaps two or more sixths may be reserved; if so, it is very material, and of the utmost consequence, that it should go to the remainderman, for if it should go to the executors, or to the heirs general, of the tenant for life, he might strip the remainderman, for he may reserve a larger pleasure dole, which will, of course, diminish the rent; but it is said that by the course of the county, and according to the evidence, that this dole is such an interest which might have been reduced into possession by Mr. Pendarves Basset; that he might have given notice according to the power, and that he would have become a partner in the trade, and then this dole would have gone to his representatives as part of his personal estate, and that if it would have done so, if reduced into possession, it ought to do so now. But I am of opinion that that makes a difference; for though, if he had given notice and paid his money, he might have done what he would with the dole, it is reserving a power of re-entry, in effect, for one-sixth part, and if he had taken the dole up, he might have leased it out again, for his own benefit, but as he has not done it, it will be otherwise. And this lease may be well compared to that, where a man is tenant for life, without impeachment of waste, and makes a lease under a power, for twenty-one years, reserving a right of entry, to cut down timber; if he enters and cuts down timber, it is turned into personal estate, but if he does not enter, in his lifetime, and cut down the timber, neither his executors nor his administrators, nor his heirs nor assigns, can do it, although he reserves the power in the lease for them to do so, but this power of entry, and of cutting down timber, will devolve upon the remainderman. The present dole is of the same nature, and falls to the remainderman, as it remains unexecuted; indeed, if it had been executed, there would have been the highest reason to

have made it part of his personal estate; because, then he would have paid the sixth part of the expenses, which the lessor had been put unto in winning the mine and working it, and his personal estate would have been lessened, and applied for that purpose; but where the said dole was never reduced into possession, that reason will not exist, and the personal estate can then make no equitable pretensions, as it has received no diminution.

There is one argument much insisted on: that this dole should belong to the personal representatives of Mr. Basset, because one eighth of an adventure which he had in the Dalkeith mine, passed by the word adventure to the defendant, and nobody could doubt but that one eighth did pass, because he was, as to that, an actual partner or adventurer in the trade, and if he had not devised it, it would have gone to his personal representative; that was a personal right originally, but this is by way of reservation made by the power, annexed to the land, and that power unexercised. Therefore, I am of opinion that this right to the dole is not part of the personal estate, but will result to the reversioner or remainderman by this lease. But, to go further, if the case were less strong for the remainderman, as to the nature of the interest itself, yet he has a title to it, according to the terms of the lease; for whatsoever arises upon the lease, by way of reservation, condition or power, till executed, goes along with and is attendant upon the reversion, and that the word "heirs," wheresoever made use of, must mean the remainderman or reversioner, and not the heir general of the tenant for life; for it is very clear that the reservation of the one sixth part of the ore, by way of rent, to the lessor, his heirs and assigns, can not mean his general heirs, because it was out of his power to reserve it to them. If that be so, the word heirs in the proviso, upon which the question arises, must have the same construction; and the same word in the same deed shall not have different meaning and exposition. Indeed, the covenants may operate differently, and by the word heirs may mean heirs general, but as to the condition, power or liberty, it is otherwise. And this is explained by a following proviso, where Mr. Basset reserves a power for himself, his heirs and assigns, during the term, to have liberty for himself, or any other person whom he shall

authorize, to enter upon the land and dig and work such part of the premises as the lessees shall refuse; heirs here must mean the reversioner, and though heir be more strictly applicable to the reversion, because it is to enter upon the land, yet it is only to enter during the term and so not fixed to the heirs in the reversion, because he might lease and reserve liberty to his heirs general, during the term; but that shall not be intended, nor shall it receive a different meaning from what the same word bears in the rest of the deed.

Next question, whether he has devised this dole, but that is immaterial, as he had not power to do it; but, if there had been more doubt upon the power, yet I should doubt whether his dole had been comprised in the words adventure or share of adventure. The one eighth part in the Dalkeith mine, was the share of an adventure; but this dole is neither an adventure, nor the share of an adventure; but only a power to take up a share of an adventure, if he thought fit; which he has not done, for he has not advanced one shilling toward it. And I am of opinion against the defendant, both as to the power and as to the devise itself, that there was not words nor power to pass this dole to him.

NEEL v. NEEL.

(19 Pennsylvania State, 323; B. & W. L. C. 252. Supreme Court, 1852.)

[1] **Tenant for life may mine for sale.** A tenant for life of land having coal mines opened on it, may mine the coal not only for his own use, but also for sale.

[2] **He may also cut timber** on the land for use in his mining operations.

Error to the District Court of Allegheny County.

Bill filed at the instance of Archibald Neel *v.* John Neel, and Grizella his wife, and others, to November Term, 1847.

The bill set out that the title of both parties arose under the will of Thomas Neel, who died in 1829. Grizella Neel,

[1] *Westmoreland Co.'s App.*, 10 M. R. 394. Compare *Franklin Co.* v. *McMillan*, Id. 224.

[2] *Findlay* v. *Smith*, 13 M. R. 182.

the wife of John Neel, had a life estate under his will. She was the widow of Thomas Neel. She entered upon the premises under the devise, and afterward intermarried with John Neel, one of the parties to whom the remainder was limited, to take effect upon the death of Grizella Neel. That Archibald Neel is also one of the parties to whom the remainder is limited. The clauses in the will under which the controversy arose are as follows: "I do bequeath as follows to my dear wife: I give and bequeath my right and title of the landed property on which I live, etc. The landed property bequeathed to my wife during her lifetime, and at her death to fall back to my blood relations, my brothers and sisters." The tract of land devised lies adjacent to the Monongahela river, and is accessible through land owned by John Neel and others, lying immediately in front of the same, and between the land devised and the river. During the life of Thomas Neel, a coal pit was opened on the part of the tract remote from the river, and worked for family use and for the benefit of the neighbors; but it was alleged that a very inconsiderable quantity of coal was excavated. Thomas Neel cut and sold timber to some extent on the land.

It was alleged that after the intermarriage of John Neel with Grizella, he entered into contracts for the erection of railways on his own land, and the opening of two coal pits on the same, leading in the direction of and entering the breast of coal in the land devised to Grizella for life, and by himself and others excavated and sold a large quantity of coal, and is still continuing the excavation and sale, under the pretense that he is entitled to the same under the devise, and avers that he intends to continue said excavation. The coal underlies the tract in its whole extent and is of great value, there being not less than one hundred acres of the same. Under the same pretense, John Neel has sold, wasted and destroyed a large quantity of valuable timber.

The complainant alleged that the acts of the defendants amounted to waste; that they are destructive to the interests of those in remainder; that the tenant for life has no right to open *new* pits and work them for the purposes of sale, and has no right to cut timber to a greater extent than is necessary for the improvement of the farm and the purposes of agriculture.

The complainant prayed for an account and injunction to stay further working of the pits and cutting of timber; for an apportionment according to the relative interests of the parties; and for an injunction against any acts of the defendants that would interfere with such apportionment; and for general relief.

John Neel, the respondent, denied that he entered exclusively in right of his wife under the devise in Thomas Neel's will, but that he claims title to said lands in his own right, and denied that complainant has any title to said tract. He also admitted that there was considerable timber on it at the decease of Thomas. But he alleged that two coal pits were *open* on the land in the lifetime of said Thomas; that one of said pits, to wit, that on the rear of the farm, was used for every practical purpose by the said Thomas. He took fuel from it for his own use, hauled it away and sold it to the neighborhood to a large extent, and used it for burning lime, etc.

He also alleged that the other pit was open on the river at the time of his marriage, and he believes had reached the land of Thomas through the land held by Crawford before the decease of the said Thomas. He further alleged that the coal, taken from said lands by himself or tenants under the devise to his wife, was all taken from the same vein or stratum, which was opened and in use by the said Thomas Neel. The quantity taken by one tenant for sixteen years past, when he made his first lease with him, is stated by the tenant at about 100,000 bushels per annum. The lease with the other tenant commenced in 1839, and he has taken out also about 100,000 bushels per annum, but a large proportion of this coal was taken from the coal bank on the river lots, the property of John Neel alone. That a large body of coal, more than half the tract, remains untouched.

He also alleged that much of the best timber on the tract was cut and sold by Thomas Neel in his lifetime; and though the respondent has used a good deal of it for the purposes of the farm, that a large part of it is yet standing on the premises. He averred that the timber taken by him and tenants was for fencing and building on the farm, and for props for the coal pits, and that no part of it was ever sold or removed from the premises.

LOWRIE, J., decreed that the complainant was not entitled to injunction, account or the relief prayed for, and an appeal from the decree taken.

The exceptions taken to the decree were as follows:

1. That tenant for life has no right to open new pits on the tract; and if he has, has no right to work them except for his own use and for the uses to which the original pit opened by the testator was worked.

2. That if entitled to open new pits and work them for the purposes of general sale, that the plaintiff is entitled to a decree that the subject-matter be referred to a master, to ascertain the relative value of the respective interests of the tenants for life and those in remainder, and to have the same apportioned, and for an injunction prohibiting the tenant for life from going beyond the apportionment.

3. That he is entitled to an account for the general purposes of his complaint, and for the additional purpose of ascertaining whether the respondents have not already excavated an amount of coal beyond the amount to which they would be entitled under an equitable apportionment.

4. To similar decrees in relation to the timber.

5. To such other relief as in equity, good conscience, etc., he ought to have.

WOODS, SHALER and STANTON, for complainant.

MCCANDLESS and HEPBURN, for defendants.

The case was affirmed on the opinion delivered by LOWRIE, J., in the District Court, which was as follows:

It is insisted that the devise to the widow of the "right and title" of the land during her life, is something more than an ordinary life estate, and that the widow has a right to exercise as full control over the land, the mines within it, and the trees upon it, during her life, as the testator himself could have done, restrained only *boni viri arbitratu*, and that she is not impeachable for waste in the exercise of any proper discretion as to the use of the land.

This is, perhaps, the distinction of the civil law, wherein the

rights of the usufructuary and the farmer (*colonus*) are very different. The usufructuary had a right to seek for and open every kind of mines, stone and lime quarries, chalk pits and gravel banks, if he did not thereby occupy a necessary part of the fields, and did no injury of the culture of the ground: Dig. 7, 1, 13, 5.

And this would seem to be not inconsistent with the ancient common law of England, for by it tenants for life and years were without restraint for waste, as we find in all the early books, from Doctor and Student, 102, 3, 7, 13, downward: 2 Inst. 299; 5 Co. 13*b*; 4 Co. 626; 6 Co. 43*a*; 3 Com. 483.

They were first made liable for waste by the Statute of Marlborough: 52 Henry III, Chapter 23, Sec. 2. But this statute applies in its terms to *farmers* only, who are lessees rendering rent. This statute is not reported to be in force in Pennsylvania, but the Statute of Gloucester, 6 Edward I, Chap. 5, is. Yet this would seem to be intended only to furnish a more adequate remedy for the wrongs declared by the Statute of Marlborough: Rob. Dig. 9; 1 Cruise Dig. 135.

Looking, therefore, at the old common law and the statutes in alteration thereof, the argument of the defendant's counsel would seem to be not without plausibility. But when we turn to the decisions on the subject, we do not find that any such distinction is made between lessees for life and other tenants for life. All the English authorities treat the subject as if the statutes extended to all kinds of tenants, and this is taken for granted in *Woodman* v. *Good*, 6 W. & Ser. 169.

And the old authorities, beginning with Doctor and Student, 113, go upon the assumption that what is waste in one tenant is waste in another, on the maxim that "all cases like unto other cases shall be judged after the same law as other cases be." Yet in the modern cases there may be some distinction taken; the privilege allowed being more liberal to tenants for life than to lessees for years. This is more clearly marked in the American cases, allowing tenants for life the privilege of cutting down timber in order to improve the land and fit it for cultivation. This, of course, increases the power and the profit of the tenant for life, and diminishes the control of the remainderman. Yet this is subject to the rule of good husbandry, and does not violate the principle that the substance of the land is not to be taken away.

But as to all tenants for life, the rule has always been that the working of open mines of all sorts is not waste. The tenant for life has the usufruct of the whole land, and takes the whole profit that can be derived from it in following out the use made of it by the donor. A nursery garden may be still used as such, though usually it is waste to sell trees and shrubbery. And the tenant for life is not at all limited by the extent of the use made of the property by the author of the gift. The law draws no such distinction, and we can not follow the plaintiff's counsel in the view taken by them.

It seems, in this case, that the author of the gift had sometimes sold coal out of these pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only *fire-bote*. The fact of his opening the pits made the coal a part of the profits of the land, and the right to them will pass as such, by a devise of a life estate. If he meant otherwise he should have said so; not having said so, this is the legal influence of his intention. And on this subject there is no conflict in the decisions: 5 Co. 12; 1 Brown, 241; Cro. Eliz. 683; *Sanders' Case*, Co. Litt. 54*b*; 1 Taunt. 402, 409, 410; 2 Beav. 466; *Clavering* v. *Clavering*, 2 P. Wms. 389, and Mosely, 219; 1 Cowen, 460; 1 Rand. 258; Styles, 68; 10 Pick. 460; 6 Munf. 124; 2 Southard, 552; 2 Green's Chan. Reps. 469; *Rutland's Case*, 1 Lev. 107; Sid. 152; 1 Rep. 557.

And the decisions refer to coal mines, gravel banks, clay pits, lead mines, iron mines, stone quarries, slate quarries, salt works, and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes: 1 Taunt. 410. And if necessary to the proper working of them, to make new openings in the ground, these are allowed; provided no unnecessary injury be done thereby: 2 P. Wms. 389; 1 Rand. 258; 10 Pick. 460; 6 Munf. 134.

The most obvious inference would seem to be that when a man devises land, with an open mine upon it, to a person for life, he intended the devisee to derive profit from the mine as well as from the surface of the land. He may not have supposed that the devisee would exhaust the mine, and this might seem unreasonable. But when the donor did not see proper to

restrain the gift, how shall it be done? Surely, courts have no such control over the arrangements which people choose to make of their affairs. Usually, an enterprising tenant for life may be of advantage to the remainderman, but in the case of mines it may be the reverse. And I can not see how the enterprise of the citizen is to be restrained by judicial process. If we could get ourselves freer from the notions derived from feudal subordination, we would, perhaps, think that the privileges of tenants for life should be enlarged rather than restrained, and that the cultivation of the country would be thereby improved.

The only case I find that seems to favor the distinction insisted on by the plaintiff, that the privilege is to use and not to sell, is a case in the Year Books, 17 Edward III; 7 Vin. Ab., Waste, H. Pt. 1.

Then, as to the cutting of the timber: the plaintiff has lived close beside these works, and for ten years has witnessed all that was going on, and I do not think that the loss of the timber used in carrying on the works has been the cause of his present tardy activity. I know that it has been said that a lease of mines does not give a right to timber to work the mines: *Darcy* v. *Askwith*, Hob. 234; S. C. Hutt. 19; 2 Bulst., 279. But in cases of life estates in lands with mines in them, the contrary has been held: 6 Mun. 134; 2 South. 552; 2 Green's Ch. R. 469.

I think, therefore, that we should not retain this bill, either on account of the coal or the wood, and it is dismissed.

Bill dismissed.

1. Life tenant owning mines in South America allowed, on accounting, for expenditures to prevent denouncement: *Dent* v. *Dent*, 30 Beav. 363.

2. Whether remainderman can enforce contract for lease by tenant for life, see *Campbell* v. *Leach*, Amb. 749.

3. Case of waste by tenant for life: *Bagot* v. *Bagot*, 32 Beav. 509. *Post* WASTE.

4. Tenant for life is not entitled to get stone from quarries (except for repairs or buildings), nor to work any mines of coal or minerals not opened at the death of the testator: *Ferrand* v. *Wilson*, 4 Hare, 344.

5. Tenant for life, when limited to the mining of coal for domestic purposes only: *Franklin Coal Co.* v. *McMillan*, 10 M. R. 224.

6. Tenants for life are forbidden by Pennsylvania Statute from committing waste, except when requisite to "the reasonable and necessary use

and enjoyment of the estate": *Irwin* v. *Corode*, 24 Pa. St. 162. *Post* WASTE.

7. Quarries or mines opened on the land before the commencement of a life estate may be worked by the tenant for life: *Lynn's Appeal*, 31 Pa. St. 44. *Post* WASTE. See also *Reed* v. *Reed*, 16 N. J., Ch. 248.

8. Tenant for life estopped from disaffirming his own lease: *Wentworth* v. *Turner*, 7 M. R. 249.

9. Tenant for life may work open mines to exhaustion: *Westmoreland Co.'s App.*, 10 M. R. 394.

TARTAR, Respondent, v. THE SPRING CREEK WATER AND MINING CO., Appellant.

(5 California, 395. Supreme Court, 1855.)

Public lands open to first appropriator. The right to mine for the precious metals can only be exercised upon public lands; and although it carries with it the incidents to the right, such as the use of wood and water, those incidents also must be of the public domain.

[1]**Extent of title of appropriator.** A prior appropriation of the public domain establishes a *quasi* private proprietorship, which entitles the owner to be protected in its quiet enjoyment against all the world but the true owner; except in the case of agricultural and grazing lands, as against the privileges granted to miners.

Appeal from the District Court of the Ninth Judicial District, Shasta County.

Bill for an injunction to restrain the defendants from diverting the water-course of plaintiff's mill. The facts are as follows:

In June, 1852, A. G. Chauncey & Co. commenced the construction of a saw-mill on lands of the United States in Shasta county, at the mouth of a small stream called Spring Creek, and completed it in November of the same year, at a cost of about ten thousand dollars. The lands were mineral lands of the United States, containing mines of gold. The length of the creek, from its source to its mouth, was about sixteen miles, and ran entirely through lands of the United States containing gold mines.

As soon as the mill was completed, Chauncey & Co. occupied it and continued to use it until the 15th day of January, 1854. The water of said creek was the motive power by which the machinery of the mill was propelled. The defendants, who were miners and a corporation under the laws of this State, in June, 1853, commenced the construction of a dam, ditch, and flumes, about five miles above the saw-mill, in order to divert the water of the creek to mining lands in the immediate vicinity, to be used for the purposes of mining. The water was

[1] *Rupley* v. *Welch*, 4 M. R. 243.

necessary to enable the defendants to extract the gold from the land where the same was conveyed; and the ditch and flumes were constructed in the year 1853, to the extent of about five miles, and the dam across said creek was completed, by which the water was diverted, in October of the same year, from its natural channel into said ditch and flume, and conveyed to the mining lands in its vicinity, and there was used, and had since been used by the defendants for mining purposes up to the time of the filing of the complaint. The cost of the construction of the said flume, ditch and dam was about eighteen thousand dollars.

Chauncey & Co. sold and delivered to the defendants a great portion of the lumber used in the construction of said flume, and were paid by defendants several thousand dollars therefor; and Chauncey & Co. knew, at the time of such sale and delivery, the purposes for which the same was to be used. For five months of the year, from June 1st to November 1st, the water of said creek is not sufficient for the said miners and the propelling of said mill at the same time; but during the rest of the year the water of the stream is sufficient, both for the defendants and plaintiff.

The plaintiff succeeded to the rights of Chauncey & Co. on January the 15th, 1854, with the full knowledge of the above facts, and continued to use the mill until July, 1854. The defendants, since the 15th January, 1854, and before the commencement of this suit, extended their ditch and flume about a mile, at a cost of two thousand dollars, and the plaintiff sold and delivered lumber to them amounting to several hundred dollars, to be used in such extension, and was paid for the same. By means of the diversion of the water, during the time the water was insufficient for both the plaintiff and defendants, the plaintiff, in the year 1854, and before the commencement of this suit, did not make as much by his mill as he otherwise would have done, to the amount of one thousand dollars.

The cause was tried by the court, which, *pro forma*, granted a perpetual injunction, and decreed damages to the amount of one thousand dollars. Defendant appealed.

SPRAGUE & FIELD and JAMES A. MCDOUGAL, for appellant.

CROCKER & ROBINSON, for respondent.

HEYDENFELDT, J., delivered the opinion of the court. MURRAY, C. J., concurred.

The current of decisions of this court go to establish, that the policy of this State, as derived from her legislation, is to permit settlers, in all capacities, to occupy the public lands and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner.

In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the water of streams from their natural channels, for mining purposes; and others, of like character.

This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, except in the single case where the rights of the agriculturist are made to yield to those of the miner, where gold is discovered in his land. This exceptional privilege is, of course, confined to public lands, as we held in *Stoakes* v. *Barrett* at the last January term. The policy of the exception is obvious. Without it, the entire gold region might have been inclosed in large tracts, under the pretense of agriculture and grazing, and eventually, what would have sufficed as a rich bounty to many thousands, would be reduced to the proprietorship of a few.

Aside from this, the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land, or of anything incident to the land. In the case of *Irwin* v. *Phillips*, 5 Cal. 140, the question was as to the use of water, and it was decided upon the principle of prior occupancy.

The appellants insist, that, as the State has granted the franchise of digging gold, all of the incidents necessary to that purpose—wood, water, etc.—must follow. This is certainly the doctrine of the common law, and would be held decisive in this case, in the absence of any other right to contradict it. But in previous decisions we have shown that there is nothing

the defendants, who are miners, have a set of quartz claims and a quartz mill, used in extracting the gold from the rock taken from said claims. The ledge upon which the claims are situated runs in the same general direction with the said westerly line of plaintiff's ranch. For the distance of two hundred feet, or thereabouts, from the creek, the surface or 'croppings' of the ledge is in whole or in part within plaintiff's land—from thence it is without said line; but the ledge dips or inclines toward and under plaintiff's land, at an angle of about forty-five degrees, and the point at which defendants are at work underground, by means of tunnels, is beneath a portion of the ranch. The mill of defendants stands very near the westerly line of the ranch, but entirely outside of it. In order to extract the gold from the quartz in a practicable and advantageous manner, it is necessary for defendants to have wood for the purpose of heating water to be used in the amalgamatory process, and for this purpose they cut the trees complained of. They were cut at a point on plaintiff's ranch about twelve hundred feet from the nearest point of the surface of defendant's claims. The trees cut were native forest trees, and were taken from that portion of the ranch which had never been in any manner cultivated or improved. Owing to the scarcity of timber in the vicinity, and the steepness and ruggedness of the ground, which renders the mill difficult of access, defendants can not obtain wood from any source in the immediate neighborhood other than the land of plaintiff. But defendants *could* obtain wood by purchasing it from parties at some distance, of course at a greater cost. It is necessary for defendants to use about fifty cords of wood per year. I find that defendants cut on plaintiff's land as aforesaid twenty-eight trees, worth in the aggregate fifty dollars. In the mining district where these claims are, it is the custom with miners to locate quartz claims one hundred feet wide on the surface, fifty feet each way from the center of the ledge, but running with its dips and inclinations. Plaintiff claims that all the wood now on his ranch is not more than sufficient for his fire wood and domestic purposes, and also that he had recently sold some wood to persons living in the neighborhood."

Judgment was rendered for defendants, and plaintiff appeals.

JOHN GARBER, for appellant.

SEARLS and NILES, for respondents.

CROCKER, J., delivered the opinion of the court, COPE, C. J., concurring.

This is an action to recover damages for cutting timber on plaintiff's land, and for an injunction against any future acts of the same kind. It appears that for several years prior and up to the commencement of this action, the plaintiff was in the possession of a tract of about one hundred acres of public land in one of the mineral districts, which he held under the possessory act of this State, the provisions of which he had fully complied with. He resided on the land with his family, and had put thereon valuable improvements, consisting of buildings, orchards, vineyards, ornamental trees, etc., at an expense of about $8,000. A portion of the tract was under cultivation, and the remainder in its wild state, a portion of the latter being covered with oak and pine trees. At several places on the ranch gold had been found and mining carried on, but not on those portions where the timber in controversy was cut. The defendants are miners, owning and working quartz claims. About two hundred feet of their quartz ledge is on plaintiff's land, near the boundary line, and the ledge dips under plaintiff's land at an angle of about forty-five degrees. The defendants also own and work a quartz mill, for the crushing of the rock from their claims, which is located near plaintiff's land. The defendants are compelled to use wood to heat the water used in the amalgamatory process in their mill, and they cut wood upon the plaintiff's land, about twelve hundred feet from the claims, for this purpose, which constitutes the trespass complained of. Upon this state of facts the court below rendered judgment for the defendants from which the plaintiff appeals.

Under the laws of this State, any citizen of the United States may enter upon and hold an amount of the public domain, whether within the mineral districts or not, or whether containing mines or not, not exceeding one hundred and sixty acres. He has the right to occupy and improve it, cultivate

the soil, plant orchards and vineyards, and apply it to such uses as he may deem most advantageous to himself. But his possession of the land for the common usual purposes of grazing and agriculture is subordinate to the right of the miner, who, when acting in good faith, has the right to enter upon any tract of land held by another merely for agricultural or grazing purposes, and to mine the same, doing no more injury to the premises than may be necessary to enable him to work the mine in the most practicable manner.

The policy of this State is "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." *Tartar* v. *Spring Creek Water Co.*, 5 Cal. 395. This right of possession is exclusive of all others, except the miner, who has the right to enter upon any tract of mineral land which may be occupied by another merely for agricultural or grazing purposes, and to locate his mining claim thereon, according to the usage and custom of miners—to pass and repass over the land in going to and from his claim, to dig up the soil, sink shafts, run tunnels, and do all other acts necessary and proper to enable him to work his claim efficiently, being careful to do no unnecessary injury to the land.

Such, in general terms, are the rights of the miner; but these rights are subject to limitations and restrictions, necessary to prevent an interference with rights of property vested in others, and which are entitled to equal protection with his own. Thus he has no right to use water to work his mine which has been appropriated to other legitimate purposes: *Irwin* v. *Phillips*, 5 Cal. 140; *Tartar* v. *Spring Creek Co.*, Id. 395. Nor has he a right to dig a ditch to convey water to his mine over land in the possession of another: *Burdge* v. *Underwood*, 6 Cal. 45; *Weimer* v. *Lowrey*, 11 Id. 104. Nor can he mine land used for a residence and for purposes connected therewith: *Fitzgerald* v. *Urton*, 5 Id. 308. Or land used for houses, orchards, vineyards, gardens and the like: *Smith* v. *Doe*, 15 Id. 101; *Gillan* v. *Hutchinson*, 16 Id. 153.

In *Smith* v. *Doe*, 15 Cal. 101, the court says: "It must not be understood, however, that within the limits of the mines all possessory rights and all rights of property, not founded

upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected; as also growing crops of every description; for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the courts."

As was said in the case of *Tartar* v. *Spring Creek Water Co.*, "the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land." In that case, as also the case of *Clark* v. *Duval*, 15 Cal. 85, the court recognize the common law principle that the grant of the right to mine carried with it all the incidents necessary to that purpose; that this included the use of the land and such elements of the freehold and inheritance as wood, water and the like, as were necessary for mining purposes. But in the former case the court expressly says that "there is nothing sufficiently expressive in the legislation of the State which warrants an interference with the already acquired rights of individuals, except in the single case of agricultural lands." So in *Stoakes* v. *Barrett*, 5 Cal. 36, the court say, that "to authorize an invasion of private property, in order to enjoy a public franchise, would require more specific legislation than any yet resorted to." And in *Gillan* v. *Hutchinson*, 16 Id. 153, it was held that the legislature had no power to take the property of one person and give it to another, and therefore the act of 1855, giving the miner the right to dig up an orchard, vineyard, garden and crop of growing grain, by tendering the owner a bond for the payment of all damages, was held invalid.

Such are some of the principles which this court has laid down in determining the numerous questions which have arisen between the occupant of the public lands and the miner. While the rights of the latter have been sedulously

guarded, the court have been equally careful to protect the rights of the former from invasion. The question now before us has never yet been determined by this court, but it is to be adjudicated in accordance with those fundamental principles regulating the rights of property, by which one person is not permitted to take and hold that which belongs to another. The rule that priority of appropriation gives priority of right, must determine this as it has numerous other cases of the same class. The plaintiff in this case, by his prior occupation, acquired the right to the peaceable enjoyment of the land, which includes the trees growing thereon. The defendants, in locating their mining claims, took it, subject to the prior vested rights of the plaintiff. They took them subject to the rule of property laid down in *Irwin* v. *Phillips*, 5 Cal. 140. "The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they can not be taken to his prejudice; but if they have already been diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain—no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection." The right of the plaintiff to cut and use the timber growing on the land for his own domestic purposes, is as high, if not higher, than that of the defendants to use it for mining purposes. If the defendants have located in a place where wood is difficult to procure, or where wood lands are held and occupied by others, that is one of the disadvantages of their selection from which the courts can not relieve them.

The defendants can claim no right to the timber under the laws of the United States. The Act of Congress of March 2, 1831, prohibits all persons from cutting, destroying or removing timber on any of the lands of the United States, except for the use of the navy, and prescribes a fine of not less than triple the value of the trees or timber so cut, destroyed or removed, and imprisonment not exceeding twelve months, as a punishment for those who violate the provisions of the law. And, in the case of *Cotton* v. *The United States*,

11 How. 229, it was held, that the United States have the right to bring an action of trespass against a person for cutting and carrying away trees from the public lands. The public mineral lands of this State belong to the National Government, which has the full power of disposing of the land and the timber growing thereon in such manner as it may deem proper. Congress, in the exercise of this power, has authorized the settlement and occupation of the public lands, but has expressly prohibited the cutting or destruction of the timber growing thereon. The defendants can not, therefore, claim that the laws of the United States protect them in their acts. They were, in our judgment, trespassers in cutting and carrying away the trees growing on the land.

The judgment is reversed, and the court below is directed to enter a judgment in accordance with this opinion.

UNITED STATES v. NELSON.

(5 Sawyer, 68. U. S. District Court, District of Oregon, 1878.)

[1] **Occupants may cut timber.** In providing for the occupation of the public lands for agricultural or mining purposes, the timber law is impliedly repealed, so far as to permit occupants to cut and use the timber upon their respective claims.

Miner's relations to timber on the claim. A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to purchase the same, but until he does so, he has a mere license to work the ground for the precious metals therein, and has no right to use the timber found thereon, except as the same may be necessary to enable him to mine the same conveniently.

Whether the timber-cutting is incidental to the mining or the mining only a pretext to acquire the timber, is a question of fact upon the circumstances. Delay in patenting placer claim considered in this connection.

May not cut to sell. The defendant occupied seventy acres of public land as mining ground and cut timber from four acres thereof in advance of his mining operations, and disposed of the same for his own benefit, assigning as a reason therefor, that by cutting the timber in advance of the mining operations the stumps would rot and be more easily removed: *Held*, that this cutting was not necessary to the mining operation and therefore unlawful.

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[1] *U. S.* v. *Young*, 11 Fed. 493.

Before DEADY, District Judge.

Information for cutting timber on the public land in violation of section 2461 of the R. S.

RUFUS MALLORY, for the plaintiff.

L. O. STEARNS, for the defendant.

DEADY, J.

On November 24, 1877, an information was filed in this court by the district attorney against Levi W. Nelson, charging him with cutting and removing from the lands of the United States, to wit, a certain described portion of township 9 south, range 39 east, in the district of Oregon, five hundred pine trees, of the value of one hundred and twenty-five dollars, for his own private advantage and profit, contrary to section 2461 of the R. S. The defendant pleaded "not guilty," and the case was submitted to the court for judgment upon an agreed case, that was stipulated and agreed should be deemed and taken as a special verdict.

The special verdict substantially finds: 1. That between January 1, 1875, and November 1, 1877, the defendant cut and removed timber, as alleged, but that there were only one hundred and fifty of the trees of the value of twenty-five cents each. 2. That in 1870 the defendant took up and claimed the premises, containing about seventy acres, for the purpose of placer mining, and in August, 1872, caused the same to be duly surveyed and platted as a placer mining claim. 3. That in 1873 the defendant made due proof of the performance of the conditions necessary to entitle him to a patent from the United States for the premises, except the payment of the price fixed by law therefor, which has never been paid, and that said premises are not within any organized mining district. 4. That said premises are "placer mining ground;" and it is necessary, to successfully mine the same, to remove the trees standing thereon, and "that it is better for the purpose of such mining that the timber be removed so far in advance of the work as to give opportunity for stumps to rot and so be more easily disposed of." 5. That between 1870 and 1877, the defendant, for the purpose of working the premises as a min-

ing claim, constructed buildings, flumes and ditches thereon to the value of two thousand five hundred dollars; and has worked said ground continuously during the mining season of each year by employing from fifteen to twenty miners during such period. 6. That it is the business of the defendant to work such mining ground during the mining season, and he expects to continue the same permanently. 7. That about one third of an acre of said ground is worked over each year, and that said one hundred and fifty trees were taken from about four acres of the same.

Neither the information nor the special verdict state according to what meridian the township containing the locus, is nine south and thirty-nine east. But as there is but one meridian in this judicial district, the Wallamet, it must be construed as referring to that. This locates the premises in Baker county, Oregon.

Section 2461, *supra*, upon which this information is founded, is section 1 of the act of March 2, 1831. It prohibits absolutely the cutting or removal of any timber from the public lands for any purpose "other than the use of the navy of the United States," under a penalty of not less than three times the value of the timber, and imprisonment not exceeding twelve months.

The pre-emption, homestead and mining laws of subsequent date which confer the right of occupation of limited quantities of the public lands upon settlers and miners for agricultural and mining purposes, and with a view of enabling them to obtain patents therefor, are laws upon the same subject—in *pari materia*—with the timber act of 1831, and must be construed with it. It is not to be supposed that Congress authorized the occupation of the public lands by the laws aforesaid for the purpose of agriculture and mining, without intending to so modify the operation of the timber act as to permit the occupants thereunder to cut and use the timber upon their respective claims so far as the same is necessary for the purpose for which they are occupied. By the enactment of these laws, the timber act is so far repealed. Such has been the ruling of this court in giving instructions to juries in several unreported cases.

In *The United States* v. *McEntee*, 23 Int. Rev. Rec. 368,

the defendant was sued in the district court for Minnesota, to recover the value of timber cut by him on the public lands. The defendant justified the cutting upon the ground that he occupied the premises under the homestead act of 1862. The court, Nelson, J., instructed the jury that "Everything necessary for the cultivation of the land and manifesting an intention to make permanent occupancy and *bona fide* settlement is legitimate and proper to be done. The land can be cleared and timber sold, if cut down for the purpose of cultivation; but if sale and traffic is the only reason for severing the timber, and it is not done with a view of improving the land, the intentions of the lawgiver are subverted." The jury found a verdict for the United States.

Section 2319 of the R. S. (section 1 of the act of May 10, 1872), declares that "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States," under certain regulations as to quantity and work thereon during the period between selection and purchase. Among the conditions upon the keeping of which this right of occupation rests, is the performance of a certain amount of labor upon the premises annually. If the claim is a vein or lode, the occupant may purchase the same upon proof of the performance of the conditions precedent by paying therefor at the rate of five dollars per acre, or if, as in this case, it be a "placer," at the rate of two dollars and fifty cents per acre. (Title 32, C. 6, R. S.) It is manifest from the reading of the whole of this chapter of the R. S., that in contemplation of the law this right or privilege of exploration and occupation is only given as preliminary to a purchase by the occupant, and that, if it shall be ascertained that the location contains "valuable mineral deposits," he will proceed without unnecessary delay to obtain a patent from the United States therefor, by making proof of the location and labor thereon and the payment of the purchase price therefor. But, as was held in *Chapman* v. *Toy Long*, 4 Saw. 28, there is no specific provision of the law, compelling the occupant to purchase, and he may continue to hold the claim by occupation and labor, so long as he desires, and then abandon it.

The defendant in this case occupies the premises under this law, and claims the right to cut and remove the timber therefrom as incidental to and in aid of his right to mine thereon. But he is not the owner of the land until he pays for it and obtains the United States patent. It is a part of the public domain. In the meantime, the defendant is occupying it under a mere license from the government, which may be revoked at any time by the repeal of the act giving it.

The defendant, however, is not to be considered in default for not having paid for the land. His license, under the statute, to occupy and to work it as mining ground, is sufficient for that purpose until withdrawn by Congress, without purchasing it. But in considering the question whether this land is occupied by the defendant solely as mineral land or in whole or in part for its timber, and whether the trees in question have been cut and removed only as a necessary and convenient means of working the ground as a placer mine, and not otherwise, the fact that he has occupied it under the act of 1872, for nearly six years, as land containing "valuable mineral deposits," without availing himself of his right to purchase it at the mere nominal price of two dollars and fifty cents per acre can not be overlooked. If the land, or the greater portion of it, is of little or no value as mining ground but valuable for its timber, the defendant might occupy it for a few years until he had stripped the tract of its timber, and worked out the few acres that really contained valuable deposits, and then abandon it to the government. In the region where this land is situated timber is very scarce and valuable. The temptation to locate one hundred and sixty acres of timber land as mining ground, and by putting a few dollars' worth of labor upon it annually be thereby enabled to dispose of the timber upon it at from fifty to one hundred dollars an acre, is very great, and if the defendant's construction of the law is to obtain, there is nothing to prevent its being done. No proof is required as to the amount of mineral deposit in the land; and the only security against the law being used as a cover to strip the public lands of their valuable timber, is to limit the right of the locator of a mining claim to the use of such timber thereon as is necessary to the actual working of such claim.

Apply these suggestions to this case. The defendant has

located seventy acres of land under the mining law, and occupied it as a mining claim for several years. During this time he has worked over two or three acres of the ground, and cut timber off of four other acres, and disposed of it for his private benefit—probably sold it for firewood. It is admitted that the defendant has a right to cut down or destroy the trees so fast as the earth in which they stand is dug or washed away in the process of mining; and it may also be admitted that such timber may be used or disposed of by the locator in any way that is most profitable to himself, rather than to let it remain on the ground to decay. But whether the cutting of the timber is merely incidental to a *bona fide* mining operation, or the mining operation is a mere pretext for appropriating and disposing of the timber, is a question of fact to be determined in each case by its own circumstances.

But when a party goes beyond this and removes and disposes of acres of timber in advance of his mining operations for no better reason than that "it is better" for the purpose of mining to remove the timber "so far in advance of the work as to give opportunity for the stumps to rot" before the bank on which they stand is sluiced or dug down, in my judgment, he is speculating in United States timber rather than mining for the precious metals. If the law were construed so as to permit four acres of timber to be removed to give the stumps time to rot before mining operations were commenced, then ten, fifty or one hundred acres might be removed for the same reason. The removal of timber from a mining claim, to be justifiable, should proceed *pari passu* with the operation of mining. Whoever wants to go further or faster than this, and for any reason appropriate the timber to his own use in advance of his mining operations, can only do so safely by paying the purchase price of the land, and becoming the owner thereof.

There must be judgment for the plaintiff on the verdict. In arriving at this conclusion it is not necessary to impute to the defendant a conscious purpose to practice any of the devices which it has been shown his construction of the law would permit. They have only been suggested to show that the consequences of such a construction would be a material perversion and abuse of the law, and therefore it ought not to

prevail. The defendant may have been honestly mistaken as to his rights, or he may have become so accustomed to the violation of the law with the apparent consent of the government that he regarded it as of no effect.

Since the settlement of this coast the law has been enforced by fits and starts, most often against the "small fry." The executive department, in case of the large operations at least, has usually nullified the action of the courts by arbitrary pardons, or ignored the law by compromising in advance with the trespassers in consideration of a trifling compensation, called "stumpage." In 1864, a party who had openly taken hundreds of thousands of dollars worth of a rare and most valuable cedar timber from the public lands near Port Orford, and manufactured and sold the same in the San Francisco market, was found guilty in this court of violating the statute and fined the comparatively small sum of eighteen thousand seven hundred dollars—the smallest fine the law allowed. Shortly after, the executive department, without consulting the district attorney, or having any information concerning the merits of the case except the *ex parte* and interested statements of the defendant, granted him a full and unconditional pardon.

Under these circumstances, I do not deem it expedient to punish the defendant further than the law requires. The government by its indifference and neglect to enforce the law has encouraged its violation.

The defendant will be sentenced to pay a fine equal to triple the value of the timber cut and removed—seventy-five dollars.

1. A *bona fide* pre-emptor or homestead claimant may cut and sell timber from his own claim: *The Timber Cases*, 11 Fed. Rep. 81; *U. S.* v. *Smith*, Id. 487. To the contrary, *Ladda* v. *Hawley*, 57 Cal. 51; which also holds that he can not recover the price of such timber from a purchaser.

2. Homestead or pre-emption enterer may cut timber but only for necessary improvements: *U. S.* v. *Lane*, 19 Fed. 910; *U S.* v. *Williams*, 18 Fed. 475; *The Timber Cases*, 3 McCr. 519; *U. S.* v. *Yoder*, 5 McCr. 615.

3. The purchase or sale of timber by the general agent of a mining company is within his powers: *Adams Co.* v. *Senter*, 1 M. R. 241.

4. A contract to sink a shaft at a given price per foot without any specific agreement for timbering, does not include timbering: *No. 5 Mining Co.* v. *Bruce*, 3 M. R. 147.

5. The cutting of timber upon the public lands is a criminal offense and the government may proceed both civilly and criminally: *Bly* v. *U. S.*, 4 Dillon, 469, and note.

6. The Timber Act of June 3, 1878, allowing timber to be cut in certain States and Territories, does not apply to Oregon. The term "Mineral Districts," used in that act construed: *U. S.* v. *Smith*, 11 Fed. 487; nor to California: *U. S* v. *Benjamin*, 21 Fed. 285; said act construed: *Id.; U. S.* v. *Heilner*, 26 Fed. 80, follows the *Wooden Ware Case* as obligatory upon Federal courts, but the rule there expressed is oppressive, and exceeds the precedents. See note to *Coal Creek Co.* v. *Moses*, 54 Am. R. 422.

7. Different measures of damage for cutting timber against trespasser, vendee of trespasser and others: *Wooden Ware Co.* v. *U. S.*, 106 U. S. 432; *Thompson* v. *Moiles*, 46 Mich. 42; *U. S.* v. *Williams*, 18 Fed. 475; *Yahoola Co.* v. *Irby*, 14 M. R.

8. The Secretary of the Interior may prescribe rules for cutting timber in mineral districts under the act of 1878: *U. S.* v. *Williams*, 12 Pac. 852.

9. The right to timber as an incident to grant of smelting rights: *Wilson* v. *Smith*, 5 Yerger, 379; to devise of salines: *Findlay* v. *Smith*, 13 M. R. 182; as incidental to the right to mine: *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

10. Rights of life tenant to cut timber off the estate to work the mines on the estate: *Neel* v. *Neel*, 14 M. R. 363.

WILLIS v. FORNEY ET AL.

(Busbee's Equity, 256. Supreme Court of North Carolina, 1853.)

Defaulting co-purchaser. A bound himself to B to buy certain lands, and to let B have one third thereof, provided the latter paid one third of the price in three years. Afterward, A made a contract with the owner of those lands, and took his bond to make title to them. Subsequently, they rescinded the contract; whereupon, after the expiration of three years from the date of the contract between A and B, C purchased the lands in question, without notice that B made any claim to them: *Held*, 1. That B had no equity, upon the pretense of a claim upon A as owner of these lands, under the contract above stated, to pursue them into the hands of C. 2. The maxim "In equity, time is not of the essence of a contract," does not apply to bargains like the above, where it was incumbent on B to raise a part of the purchase money. 3. The obligation of A to B was personal, sounding in damages only, and did not attach to the land.

[1] **Time is of the essence of the contract,** where one co-adventurer has borne the entire burden, and the other appears only at the end to claim to share the profit.

Cause removed from the Court of Equity of Rutherford County, at Spring term, 1853.

The bill charges that William and John C. Johnson were the owners of a valuable tract of land, and that plaintiff procured a lease thereon for "mining purposes," wherein it was stipulated that he should have the privilege of continuing his operations upon said lands in search of gold for twelve months after the sale thereof by the proprietors, in case a sale of the same should be effected before the expiration of plaintiff's term therein; and that afterward, to wit, on the 5th November, 1844, the defendants, Thomas J. Forney and James H. Forney, contracted in writing that they would purchase the lands of the said William and John C. Johnson, and that plaintiff should be entitled to the one undivided third part thereof, upon his paying one third of the costs of the purchases, provided that plaintiff complied with his part of the contract within three years from the date thereof. The bill

[1] Time is of the essence of the contract in mines as a thing of speculative and fluctuating value: *Settle* v. *Winters*, 10 Pac. 216; *Macbryde* v. *Weeks*, 13 M. R. 346.

further charges that the defendants, shortly thereafter, purchased the lands in question, and held them jointly for some time, but that subsequently the defendant James purchased the interest of the defendant Thomas in said lands, and became the sole owner thereof. That within three years from the date of said contract the plaintiff offered, through his agent, W. F. McKesson, to pay to the defendant, James H. Forney, the one third part of the purchase money for said lands, and demanded a conveyance of the one undivided third part thereof; but that the defendant James refused to accept the money, and denied the right of plaintiff to claim an interest in said lands. The bill further alleges that the name of the defendant James was affixed to the contract by the defendant Thomas, as agent of said James, and that defendant Thomas was fully authorized and empowered to execute said contract on behalf of the defendant James, and to sign his name thereto. The prayer of the bill is that defendant, James H. Forney, convey to plaintiff the one undivided third part of the lands in controversy.

The defendants answer severally. The defendant Thomas admits the execution of the contract by him on his own behalf, and likewise admits that he affixed the name of the defendant James to said contract, but denies that he had any authority for doing so, or that he was empowered by the defendant James to execute said contract on his behalf. He further states that the lands in question originally constituted one tract, but that the said William and John C. Johnson made partition thereof by parol, and established a conditional line between them, and thereafter claimed and occupied their respective parts of said lands, according to the terms of said parol division. He further states that shortly after the 5th November, 1844, he purchased the "William Johnson part" of said land at the sum of $2,500, and executed his individual notes therefor, and said William Johnson executed to him (the defendant Thomas alone) a bond for title; that he purchased said lands with a view to mining purposes only, and finding, after operating thereon in search of gold, that said lands were not valuable as a mine, he concluded to rescind his contract with William Johnson for the purchase thereof, and thereupon surrendered to said William Johnson his bond for

title, and said Johnson gave up his (defendant's) notes given for the purchase money, which were then canceled.

The defendant, James H. Forney, denies the execution of the contract by him as alleged in the bill, and avers that the defendant Thomas had no authority whatever to sign his name to said contract, or to contract for him with plaintiff or any one else in any matter relating to the purchase of said lands. He further denies that he had any interest in the original purchase made by the defendant Thomas of the "William Johnson part" of said land, or that he acquired any interest in William Johnson's part of said land until after the original contract on the part of the defendant Thomas for the purchase thereof had been rescinded. He further states that, after the purchase by the defendant Thomas of the "William Johnson part" of said land, he (the defendant James) purchased, for his own exclusive use and benefit, the "John C. Johnson part" of said land, and gave his individual notes to secure the payment of the purchase money, upon the said John C. Johnson executing to him a bond for title, and that neither plaintiff nor defendant Thomas were interested in said purchase. He admits that after he purchased the "John C. Johnson part," but before he acquired any interest in the "William Johnson part" of said lands, the plaintiff claimed an interest therein under the contract alleged in the bill, and offered to pay, through his agent, McKesson, the one third of the purchase money, and that he refused to accept the money, averring, at the time, that the obligation referred to had no binding force or validity against him. He further states that after the contract between the defendant Thomas and the said William Johnson had been rescinded, and the papers relating thereto had been canceled, he purchased in his own right, and for himself, the said "William Johnson part" of said lands from said Johnson, and now holds the same under a deed of conveyance duly executed.

N. W. WOODFIN, for the plaintiff.

AVERY & BYNUM, for the defendant.

PEARSON, J.

The plaintiff has failed to prove his allegation that the

defendant Thomas was authorized by the other defendant, James, to execute in his own name the contract which the bill seeks to enforce. Consequently, in regard to the land called the "John Johnson part," which was purchased originally by the defendant James, and with which the other defendant never had any connection or concern, the plaintiff's equity is not established.

In regard to the land called "the William Johnson part," although the defendant James entered into no direct obligation, it remains to be seen whether he has not made himself indirectly liable to the plaintiff's equity.

The defendant Thomas had bound himself to purchase the Johnson land, and to let the plaintiff have one third part thereof, provided he paid one third part of the price in three years —in the words of the deed—"but this is to be closed within the term of three years, or said Willis forfeits his interests." Afterward, the defendant Thomas makes a contract with William Johnson for his part of the land at the price of $2,500, and takes William Johnson's bond to make him a title upon the payment of the purchase money. In a year or two afterward this contract is rescinded by the parties, because, as the defendant Thomas Forney says, he found, after fair trial, the land was not worth working as a gold mine, he had no wish to rent it as a farm, and he was not able to pay for it. After the contract was rescinded, and the notes of the defendant Thomas for the purchase money and the bond of William Johnson for title had been canceled, and after the expiration of three years from the date of the obligation of the defendant Thomas to the plaintiff, the defendant James Forney bought the "William Johnson part of the land" from the said William, at a full price, but with notice that the plaintiff insisted upon his equity growing out of an old "mining lease" that he held on the land, and the obligation of the defendant Thomas, under which he was entitled to the benefit of one third of the purchase.

The plaintiff insists by force of this obligation, if the defendant Thomas had completed his purchase, he would have held one third of the land in trust for him. He then infers that as soon as the defendant Thomas made the contract, an equity arose in his favor which attached to the land, put it out of the power of the defendants, Thomas and William

Johnson, to rescind the contract without his consent, and gave him an equity to follow the land in the hands of William Johnson or of any person to whom he might have conveyed, with notice of the plaintiff's claim. In reply to the objection that the defendant James did not purchase the land until after the plaintiff's right as against the defendant Thomas had been lost by the expiration of three years (the time agreed on), the plaintiff relies on the maxim, "in equity time is not of the essence of contract."

In equity, one who makes a contract with the owner of land for the purchase thereof, is considered the owner of the equitable estate, and the vendor holds the legal estate only to secure the payment of the purchase money, subject to which he is a mere trustee for his vendee. The case made by the plaintiff does not come within the operation of this principle of equity; for the plaintiff made no contract with the owner of the land—there was no privity between them. The plaintiff incurred no sort of liability to William Johnson, and consequently had no ground to insist that Johnson became a trustee for him, and acted against conscience in rescinding the contract which he had made with the defendant Thomas when he found he could not pay the purchase money.

Whether the plaintiff has cause of complaint against the defendant Thomas for rescinding the contract, will be inquired of below, but it would be a curious result of the application (or rather misapplication) of the principles of equity, if William Johnson, by reason of a contract made with Thomas Forney, in which the plaintiff was not known and by which he incurred no liability, had placed himself in the predicament of not being able to rescind the contract and take back his land, and either keep it himself or sell it to some one else, clear of incumbrance.

We are also of opinion that the case made by the plaintiff does not come within the application of the principle that "in equity time is not of the essence of a contract," the aid of which he is compelled to invoke in order to make out his supposed equity against the defendant James, who did not purchase the "William Johnson part" until after the expiration of three years from the date of the obligation entered into by the defendant Thomas. If a creditor has his debt

secured by a parol bond or by a mortgage, or if a vendor retains the legal title to secure the purchase money, it is considered in equity that time is immaterial, and the parties are supposed to be willing to let the debt stand upon the security unless judgment is taken on the bond, the mortgage is foreclosed or a specific performance is required. But the principle does not apply to a case where A, being about to purchase land, agrees to let B have one third of it, provided he will aid in raising the funds to pay the purchase money. In such a case, if the time in which the aid is to be rendered be expressly agreed on, and the party neglects to advance his portion of the purchase money, and thereby puts the burthen of raising all the funds upon the other, he can not, in conscience, insist upon a right to stand off until the struggle is over, and, at any time when he sees proper, come forward and claim a share. Time is, in such cases, of the essence of the contract, and assistance in raising the purchase money is presumed to have been a principal inducement for allowing a participation in the bargain.

The testimony of Mr. McKesson in reference to his offer to pay the defendant James the amount due from the plaintiff has no bearing, for it was made before the defendant James had purchased the "William Johnson part," and, in regard to the "John Johnson part," we have seen the plaintiff has established no equity.

In regard to the defendant Thomas his obligation to the plaintiff was merely personal, and did not attach to the land, because, by rescinding the contract with William Johnson, he never acquired a fund which the plaintiff can follow in this court; his relief, therefore, sounds in damages, and if he has a right to recover damages because the defendant Thomas rescinded the contract with William Johnson, without the consent of the plaintiff, the remedy is by an action at law. There is no ingredient of equity involved in it.

The bill must be dismissed, but without costs as to the defendant Thomas Forney.

Bill dismissed accordingly.

PER CURIAM.

HARGRAVE, Adm'r, v. SMITH ET AL.

(Phillips' Equity, 165. Supreme Court of North Carolina, 1867.)

Option to pay or re-convey. Where the owner of a one third interest in land conveyed that interest to the owner of the other two thirds, and took a covenant from the bargainee that he would sell the tract to the best advantage, and pay the bargainor one fourth of the proceeds, but would not sell unless such one fourth would amount to $1,500, and in case no sale should be effected in six months, would re-convey to the bargainor, or pay him $1,300; and a sale was not effected till after the lapse of six months: *Held*, that the obligation to sell had ceased, and the bargainor could only claim a re-conveyance of his former interest in the land, or $1,300 at the election of the bargainee.

Bill for relief upon a covenant, filed to Spring term, 1861, of the Court of Equity for Davidson, and at Spring term, 1864, set for hearing upon bill, answers and exhibits, and transmitted to this court.

The covenant in question was executed by the defendant Smith to the complainant's intestate, and "guaranteed" by the intestate of the other defendants, August 11, 1853. Its terms and the object of the bill sufficiently appear from the opinion of the court.

BRAGG, for the complainant.

GORRELL, for the defendant.

PEARSON, C. J.

Mr. Hargrave was very cautious in making the contract. He conveyed to Smith his one third of the Garner tract of land, in the confidence that Smith would make a sale of the whole tract; and by the instrument set out in the pleadings Smith was bound to pay Hargrave one fourth of the amount for which he should sell, making no deduction for expenditures necessary to develop the capacity of the mineral value of the land. Smith was not to sell at all, unless the one

fourth would amount to, at the least, $1,500; he was in good faith to make a sale for the highest price he could get, and, "in case no sale is effected within six months, at the end of that time," Smith binds himself either to reconvey to Hargrave the one third of the land, or to pay him $1,300.

By the proper construction of this instrument the obligation to sell was, at the end of six months, "*functus officio*," and Hargrave was entitled either to a reconveyance of the one third of the tract of land, or to $1,300, at the election of Smith.

The bill seeks for a specific performance of this agreement to sell, and demands payment of the one fourth of the proceeds of a sale made long after the end of the six months. The complainant has misconceived his right under the instrument of August, 1853. No sale having been made at the end of the six months, he was entitled to a reconveyance of the one third, or to $1,300, at the election of Smith. Neither Fisher nor Smith has been called on to make this election. But it is clear that the agreement to sell under the instrument, which the bill seeks to enforce, was *functus officio*, and the bill must be dismissed without prejudice, leaving the complainant to take such proceedings as he may be advised.

Bill dismissed.

PER CURIAM.

1. Time when tender may be made in suit for specific performance: *Fisher* v. *Worrall*, 15 M. R. —.

2. Extension of time by letters: *Luckhart* v. *Ogden*, 2 M. R. 602.

3. Reasonable time is a mixed question of law and fact: *Id.*; *Shepler* v. *Scott*, 2 M. R. 674; *Patterson* v. *Hitchcock*, 5 M. R. 542.

4. A condition subsequent to be performed by grantees "at their own time and convenience," must be performed within a reasonable time: *Adams* v. *Ore Knob Co.*, 3 M. R. 183.

5. Waiver of forfeiture by delay of vendee to pay on time: *Thayer* v. *Wilmington Co.*, 105 Ill. 540.

6. When time has not been made of the essence of an executory contract to convey it may be specifically enforced, notwithstanding sudden increase in value, happening after long delay: *Falls* v. *Carpenter*, 6 M. R. 398.

7. As to when time is of the essence of the contract, see *Jones* v. *Robbins*, 29 Me. 351, with full note in 50 Am. Dec. 598.

8. Parol evidence to limit time in a written contract: *Shepler* v. *Scott*, 2 M. R. 674; *Hunter* v. *McHose*, 100 Pa. St. 38.

9. Where the first party is in default on his time the other ceases to be bound by the contract limitations on himself: *Starr* v. *Gregory Cons. M. Co.*, 13 Pac. 195.

CARLYON v. LOVERING ET AL.

(1 Hurlstone & Norman, 784. Court of Exchequer, 1857.)

[1] **Right to flow acquired by Grant, Prescription or Custom.** The privilege of washing away sand, stone and rubble dislodged in the necessary working of a tin mine, and having the same sent down a natural stream running through the plaintiff's land may be the subject of a grant, and may be pleaded as a prescriptive right under the statute, to a declaration charging the defendants with throwing such stone, sand and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom.

Declaration for wrongfully throwing sand, stone, rubble and other stuff into a natural stream of water flowing through the plaintiff's lands, whereby the channel was obstructed and the water flowed over and upon the lands and destroyed their produce. Fifth plea: that the defendants were occupiers of the lands near to and above the plaintiff's lands and of a tin mine situate within the lands of the defendants; and that the defendants and all other occupiers of the lands and tin mine of the defendants, for twenty years, etc., enjoyed, as of right and without interruption, the right from time to time as occasion required, at their free will and pleasure, of working the tin mine, and winning therefrom tin and tin ore, and in the course of so working and winning the same, of washing away, by means of the stream of water in the declaration mentioned, where the same flows through the lands and tin mine of the defendants, the sand, stones, rubble and other stuff which were dislodged or severed in the course of so working the tin mine, and of casting and throwing from and out of the tin mine, the sand, stones, rubble and other stuff into the said stream where the same flows through the land and tin mine of the defendants, and of having the same washed and carried away by the flow of the stream toward the sea, to that part of the channel of the stream which is situated within the lands of the plaintiff—as a right to the tin mines of the defendants appertaining, and for the more beneficial

[1] Stream-tin is worked for in exactly the same manner as placer-gold.

enjoyment thereof, etc. The plea then justified the acts complained of in the exercise of the above right. The sixth plea alleged an enjoyment of the right for forty years. The eighth plea stated that the land of the plaintiff and the land and the tin mine of the defendants and the channel of the stream were within the Stannaries of Cornwall, and subject to the customs of the said Stannaries, and that there was an immemorial custom for the tinners and miners within the Stannaries working and winning tin and tin ore from any tin mine near to a stream of water flowing by such mine to wash away in such stream the sand, stones and rubble which should become dislodged in the course of working the mine, and cast the same into the stream, etc. The ninth plea stated that the defendants and other occupiers of the land wherein the tin mine of the defendants is situate, for twenty years, etc., enjoyed as of right, and without interruption, the right from time to time, as occasion required, at their free will and pleasure, of using the stream where the same flowed through the lands of the defendants for the purpose of getting such minerals as they might desire and be able to get therefrom and for washing away the sand, stones, rubble and other stuff which it might be necessary to dislodge in the course of so getting the minerals and of having the same washed away by the water of the stream, etc. The tenth plea alleged an enjoyment of a similar right for forty years. The twelfth plea alleged an immemorial custom for miners within the Stannaries, working and winning tin and other minerals and things capable of being dug or won from any mine situate near a stream of water, to wash away by means of such stream the sand, stones, rubble and other stuff which should become dislodged in the course of working the mine, etc.

On demurrers to the above mentioned pleas joinder was had.

COLLIER (and PHEAR with him), in support of the demurrers.

MONTAGUE SMITH and with him KARSLAKE, *contra*.

The judgment of the court was delivered by WATSON, B.

This was a demurrer to several pleas. The fifth, sixth,

ninth and tenth pleas were under the Prescription Act, 2 & 3 Will. IV, C. 71, S. 2; and the eighth and twelfth pleas were founded on alleged customs.

The declaration was for fouling and sending rubbish down a natural stream of water running through the plaintiff's land. The effect of the fifth, sixth, ninth and tenth pleas was, that the defendant was possessed of a tin mine higher up the stream than plaintiff's land, and in respect thereof had used, as of right, the privilege of washing away, by means of the stream above the plaintiff's land, the sand, stones, rubble and other stuff which became dislodged or severed in the course of working of the tin mine, and using the tin and tin ore. The user, in some pleas, was alleged to have been for twenty years; others of these pleas were founded on an user of forty years.

We are of opinion that these pleas are good in law. The words of the statute are "That no claim which may be lawfully made by any custom, prescription or grant, to any watercourse, or the use of any water which shall have been actually enjoyed by any person claiming right thereto, without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way was first enjoyed at any time prior to such period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such way shall have been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible."

This alleged privilege was a claim to a watercourse under that act: *Wright* v. *Williams*, 1 M. & W. 77; but it was contended that such a privilege could not be the subject-matter of grant, inasmuch as excessive user might injure the plaintiff's property to such an extent as to exclude the plaintiff from the entire enjoyment of his land. The question is, whether such a privilege as that set forth in these pleas could be the subject-matter of a grant; for, if it could not, the pleas would not be supported: *Rochdale Canal Company* v. *Radcliffe*, 18 Q. B, 287; *Mill* v. *Commissioner of New Forest*, 18 Com. B. 60. The plaintiff, as a riparian proprietor, has a right to have the water of this natural stream run through his land in its accustomed purity, without being polluted by any riparian proprietors or others higher up the stream; but that right he may

abandon by allowing a user to have continued for twenty or forty years; or he may grant the privilege to an owner higher up the stream, for his advantage, of invading that right to the detriment of the water flowing through the plaintiff's lands. We can see no reason why such a privilege, although injurious to the plaintiff to a great extent, might not be granted. In the above cited case of *Wright* v. *Williams*, pleas of a similar kind to the present were held good on demurrer. Many cases have occurred where similar pleas have been pleaded and verdicts passed upon them without objection.

But it was urged that the cases of *Hilton* v. *Granville*, 5 Q. B. 701, and *Clayton* v. *Corby*, Id. 415, were authorities in point for the plaintiff. The former case arose on two pleas—one of prescription, the other a claim by custom for the lessees of the crown to work collieries to the prejudice and injury of the owners of houses on the surface. Both pleas were held bad in law. The pleas of prescription and custom in the judgment of the court were put on the same footing. With reference to the argument that the claim was void on the ground of unreasonableness, the court says, "those pleas are the same with reference to this objection. If either the prescription or the custom is bad on that account, the other must be bad likewise, and if the one is valid in law the other may be valid also." *It* is only necessary to say that these pleas are good, if the claim could be the subject-matter of a valid grant, without reference to prescription or custom. The court, however, says, in the judgment in *Hilton* v. *Lord Granville*, "But a claim destructive of the subject-matter of the grant can not be set up by any. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." We can not think that this observation was necessary to the decision of that case. Be that as it may, we do not think that the effect of this claim is to destroy the plaintiff's land, although it may be detrimental thereto. *Clayton* v. *Corby* was also cited, and urged as an authority against the validity of these pleas. That was an action of trespass, with pleas of user for thirty years to take and dig so much of the clay of the plaintiff's close to make bricks at the defendants' lime kiln. It was objected, and held by the court,

that the plea was bad upon the ground that it enabled the defendant to exclude the plaintiff from his land. This decision might be upheld by considering it as a conveyance of all the seam of clay, which, like a seam of coal, lies in livery and not in grant: *Wilkinson* v. *Proud*, 11 M. & W. 33. Indeed, at the end of the judgment, Lord Denman, at p. 422, is reported to have viewed the objection to the plea in that light, when he says: "What is it but an indefinite claim to take all the clay" out of and from the close in which, etc., "in other words, to take from the plaintiff, the owner, the whole close." We think that case is distinguishable from the present, as under the present claim it is not to take the land or any part of it.

The pleas founded on alleged custom admit of other considerations. The question is, whether or not the custom as pleaded is good in law. It is settled, that a custom, to be valid in law, must be reasonable, certain and defined. It was objected that the custom, as pleaded in the present case, was unreasonable and indefinite, as the exercise of the custom might go to the destruction of the plaintiff's land adjoining the stream; that there was no limit to the user as to times of user or extent of user. No doubt, if that were so, the pleas would be bad, but we think they are not open to these objections. The exercise of the privilege, as claimed, was in respect of working a mine and winning the ore where the stream passed through the defendants' land. Thus the user is limited to the necessary working of the mine and the quantity of water sent down, although not expressly so alleged. The case of *Wilkes* v. *Broadbent* (1 Wils. 63) was pressed on us as a conclusive authority against these pleas. In that case the tenant of the lord of a manor justified under a custom to dig the mines and lay the rubbish on the surface in heaps upon the land near the pits, at the will and pleasure of the lord; and the alleged custom was held bad because it was uncertain—the words "near to" were of too great latitude; secondly, because it laid too great a burden on plaintiff, and, being at the will of the lord, savors of arbitrary power. We do not think this custom open to these objections. It is not to take the land, or any part of it, but merely to pollute the water of this stream in the course of working the mine. We

do not see that this has a tendency to destroy the plaintiff's land or exclude the plaintiff from the user of his land, except to a partial extent. We think that the custom alleged is sufficiently definite, and is not unreasonable. It is possible more stuff from the mine may come down at one time than at another, but that does not show that the custom is bad. (See *Tyson* v. *Smith*, 6 Ad. & E. 745; 9 Id. 406.) We think that, as it is to be confined in user to the necessary working of the mine, etc., that the pleas are good, and that there must be judgment for the defendants.

Judgment for the defendants.

1. An easement obtained by prescription through tin bounders inures to the benefit of the owner of the soil after its abandonment by the tin bounders *Irving* v. *Stocker*, L. R., 1 Ch. App. 396.

2. The rights of tin bounders, according to custom, to the use of water for streaming tin, will not prevent another from acquiring a prescriptive right to the enjoyment of the water by twenty years' user, nor will this right be affected by an agreement with the tin bounders to abstain from fouling the water: *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

THE UNITED STATES v. GEAR.

(3 McLean, 571. U. S. Circuit Court, District of Illinois, 1845.)

Object of entry always admissible. A permit to enter on lead lands may be shown in an action of trespass by the United States, not as a justification, but to show the nature and object of the entry.

[1] **Receipt condoning trespass.** A receipt in full from an authorized agent for rent is a full discharge, being subsequent to the alleged trespass, though the officer may never have accounted for the money received.

Mr. GREGG, district attorney, for plaintiffs.

Messrs. HARDIN and CAMPBELL, for defendant.

Opinion of the Court.

This action was brought by the United States, for a trespass upon certain lands containing lead ore. The defendant pleaded the general issue and notice, etc.

It was proved that defendant, being in possession of certain mineral lands, had dug of lead ore about one hundred thousand pounds, which contained from sixty to seventy per cent. of pure lead. The mineral was worth from fifteen to eighteen dollars per thousand pounds.

The defendant offered in evidence a permit from an authorized officer of the government to enter upon the land, which was objected to, but the court admitted it as evidence, as it explained the nature and object of his entry, and showed that it was not tortious. He also offered in evidence a receipt of John Flannigan, agent for the lead mines, for four hundred dollars in full for rent of lead mines, dated in 1841, subsequent to the trespass laid in the declaration.

This receipt was objected to on the ground that the agent had never accounted for the money, but the court admitted it as evidence, and instructed the jury that unless there was fraud in obtaining the receipt, or a mistake (of which there was no evidence), that it was a full discharge. That the money having been paid by the defendant to the authorized agent of the government, the payment was good, though the agent may never have accounted for it. Verdict, *not guilty*.

[1] *Williams* v. *Pomeroy Co.*, 6 M. R. 195.

[1]BAKER v. KING ET AL.

(18 Pennsylvania State, 138. Supreme Court, 1851.)

Inception of title. An application for land is not an inception of the title until it is filed in the land office and the office fees and purchase money paid to the Commonwealth.

Priority among applicants. A person had an application made out for land, and afterward, on the same day, another person had an application prepared for the same land, and whilst about having it prepared, he was informed of the previous application; the application of the second person was first filed in the land office: *Held*, that if there was no fraud or deception on his part, his warrant was entitled to prevail over the warrant issued on the application first prepared but last filed.

Idem. It was a material circumstance in favor of the title of the plaintiff in the ejectment, that he was a *bona fide* purchaser of the warrant first issued, and had received a deed from the warrantee after a decision in favor of such warrant by the Board of Property on a *caveat* filed by the second warrantee, in which the latter claimed by virtue of an actual settlement, but without referring to his warrant, and that the plaintiff was without notice of claim under the warrant last issued or of the preparatory writings to obtain a warrant.

[2]**Trespass by party in constructive possession.** A warrant for unimproved land gives to the owner of it a constructive possession of the land which will enable him to maintain trespass for digging ore upon it, against one who has not an actual adverse possession of the land.

Error to the Common Pleas of Indiana County.

Trespass brought by Elias Baker against George S. King and others to recover damages for an alleged breaking of plaintiff's close, digging up and carrying away a large quantity of iron ore.

The plaintiff claimed under a warrant to Wm. D. McKirnan, dated 6th of August, 1844, and a survey made on said warrant, dated 10th of August, and 13th and 14th of September, 1844, for 59 acres, 137 perches, covering the land where the alleged trespass was committed.

The defendants claimed under David Stewart, who took out a warrant for the same land on the 7th of August, 1844. Applications to the land office for the warrant were prepared

[1] S. C. on second appeal (*Shoenberger* v. *Baker*,) 14 M. R. 412.

[2] *Patchen* v. *Keeley*, 14 Pac. 347; *Fuhr* v. *Dean*, 6 M. R. 216; *Hugunin* v. *McCunniff*, 14 M. R. —

for both Stewart and McKirnan, on the 3d of August, 1844. Stewart had his made out in the morning, and McKirnan had his prepared in the evening of that day. Stewart entered a *caveat* against the acceptance of the McKirnan survey, alleging that the right to the land was vested in him by virtue of an actual settlement, commenced about the year 1822, but his warrant was not mentioned. On the 2d of March, 1846, a decision of the "Board of Property" was made in favor of the acceptance of the McKirnan survey, and on the 5th of December, 1846, McKirnan conveyed his interest in the land to Elias Baker, the plaintiff, and upon this title Baker sought to recover.

The defendants resisted the plaintiff's recovery on the ground that the right to the land was vested in them by an actual settlement made at an early day; that they had purchased this claim from a certain Samuel Mizener. They also offered in evidence the warrant to David Stewart, dated 7th of August, 1844, for fifty acres of land adjoining other lands of Stewart, bought from Samuel Mizener, land of Thomas Clark, Catherine and John Davis, unimproved. The warrant was indorsed, executed and came to hand 29th of August, 1844, and was surveyed by Robert Magee, deputy surveyor, on the 15th and 16th of December, 1848, to King and Shoenberger, for 49 acres and 24 perches. They proved a sale by Stewart to the defendants of the land in dispute, on the 20th of November, 1846. The defendants further showed the record of an action of ejectment brought by David Stewart against William D. McKirnan and Elias Baker in the Common Pleas of Indiana County, issued 3d of April, 1846, which was served on McKirnan 3d of July, 1847.

The plaintiff's counsel offered the duplicates of Brushvalley township in evidence, to show that Mizener, under whom the defendants claimed, for the years 1837, 1838, 1839 and 1840, returned to the assessor for taxation only 110 acres of land, and for the years 1841, 1842 and 1843, 262 acres, and for the year 1844, 250 acres, which was transferred from Mizener to David Stewart. It was alleged that the whole survey, including the improvement and the part on which the warrant was laid, contained 325 acres, and allowing the 250 acres transferred by Mizener to Stewart to be held by improvement, it left a

sufficient quantity of land outside of this 250 acres to be appropriated by the McKirnan warrant, without interfering with the Mizener improvement. This position was sustained by the description given by Stewart in his warrant of the 7th of August, 1844, as he described the land in the warrant as adjoining other lands of him, the said Stewart, purchased from Samuel Mizener. From these facts it was contended that Stewart could not hold this land by virtue of the Mizener improvement, as well as from evidence showing that at the time McKirnan made his survey, Mizener, who was along with the surveyor, showed his lines, and that the land from where the ore was taken was not within his claim.

The evidence further showed that at the time McKirnan was taking out his application for the land in dispute, he was told that on that day Stewart had taken out an application for the same land, and that he was ahead of him, and his would be of no avail. McKirnan replied that he would try and get to the land office before Stewart, and get his warrant first, which he did. On this point, which was the subject of the third proposition submitted on the part of the defendants, Knox, J., instructed the jury if they believed that Wm. D. McKirnan, at the time he made his application, knew that David Stewart had already made an application for the same land, that he, McKirnan, acquired no right by his application, in hastening to the land office with his papers, in advance of Stewart. The evidence did not show that McKirnan had any knowledge of Stewart making an application for this land, until he, McKirnan, went to make his own application, and he was then told that on the same day Stewart had an application prepared for the same land.

To the fourth point submitted on the part of the defendants, the court instructed the jury that the warrant in the name of Stewart was a descriptive warrant, and gave title from its date, and the circumstance of no survey being made thereon for four years, would not invalidate the title or right acquired under said warrant; and, more especially, if the jury find that the warrantee had actual possession of the land described in the warrant, and exercised acts of ownership over it.

The court further instructed the jury, that if the defendants were in actual possession at the time the ore was dug,

they were entitled to a verdict without regard to title. If they were not, then the possession would follow the title, with regard to which we have given specific instructions in our answer to defendant's points.

The second point submitted and the answer was as follows:

"If the jury believe that the plaintiffs were not in actual possession of the land in dispute, at the time of the alleged trespass, but that the defendants were in possession thereof, using the same and claiming to be the owners thereof, then the plaintiff can not maintain this action."

This point is substantially correct. The plaintiff must show, in order to sustain his action, that he was in the actual or constructive possession of the land in dispute. If the plaintiff was the rightful owner of the land, and there was no adverse possession, he would have sufficient possession to enable him to maintain trespass, even although he may not have been in the actual occupancy of the tract; but if there was, at the time, such adverse possession existing in the defendants, then this action can not be sustained. Whether there was such adverse possession is a question for the jury. Was the land in dispute embraced in the Bracken claim? Did Bracken or Mizener sell it to Stewart, and Stewart to King and Shoenberger, and were they using it under the claim of title? If so, they must be considered as having the actual possession; but if it was not so transferred to them, a mere entry upon the tract for the purpose of making roads, digging ore, etc., would amount to nothing more than repeated trespasses against the real owner, and would not destroy his possession.

Verdict for the defendants.

It was assigned for error that the court erred in their answer to the second, third and fourth points; and in charging the jury that if the defendants were in the actual possession at the time the ore was dug, they were entitled to a verdict without regard to the title.

FOSTER and STEWART, for plaintiffs in error.

COWAN and BANKS, *contra*.

The opinion of the court was delivered by CHAMBERS, J.

The plaintiff, in support of this action of trespass for breaking his close, and digging and carrying away a large quantity of iron ore from a tract of unimproved land, gave in evidence a warrant to Wm. D. McKirnan, dated 6th of August, 1844, with a survey made in September, 1844, for 59 acres 137 perches, embracing the land on which the alleged trespass was committed. David Stewart, under whom defendants claim, took out a warrant for the same land on the 7th of August, 1844. It is in evidence that the written preparatory applications to be presented to the land office were written with the certificates of the justices in the county of Indiana, on the 3d of August, for McKirnan and Stewart, Stewart having his prepared in the morning of that day, and McKirnan in the evening, when he was made acquainted with the intended application of Stewart, prepared earlier on the same day. Stewart entered a *caveat* against the acceptance of the survey of McKirnan, alleging that the right of this land was in him by virtue of an actual settlement, commenced in 1822, and without claiming under his warrant of the 7th August. The Board of Property on the 2d March, 1846, decided in favor of the acceptance of the survey of McKirnan, who, on 5th of December, 1846, conveyed by deed to Elias Baker, the plaintiff. The defendants claimed under the said warrant to Stewart, which did not call for any improvement, and was reasonably descriptive of the land in controversy; and gave in evidence an ejectment brought by Stewart, pending against McKirnan in April, 1846; a conveyance by Stewart to the defendants on 20th November, 1846; and a survey made for them by the deputy surveyor in December, 1848, for 49 acres and 24 perches.

The court in reply to the third point submitted on part of the defendants, instructed the jury, if they belived that McKirnan, at the time he made his application, knew that Stewart had already made an application for the same land, that he acquired no right by said application, in hastening to the land office with his papers in advance of Stewart. This instruction is now assigned for error by the plaintiff.

The grants of land by this Commonwealth to individuals are founded on written applications describing the land; and if founded on a settlement, must state when the improvement

commenced, with the oath of the applicant that no other office right had been issued for the same under which he claimed title, with the certificate of two justices. This is the requisition of the law, for the protection of the Commonwealth in its claim of interest on the purchase money. The preparation of the intended application is in the country before two justices, and is the act of the individual, under his control, *in fieri*, forming no contract or an inception of title until filed in the land office, and the office fees and purchase money paid to the Commonwealth. Where there is an antecedent settlement, if prosecuted and continued, it constitutes an inception of title, to be regarded and protected from its commencement. This species of title is, from necessity, to be established by parol; and as it consists of acts done on the ground, visible, permanent and notorious, which are notice to the neighborhood as well as inquirers, the public, applicants or purchasers, need not be misled by reasonable vigilance. If an individual should take out a warrant for land thus appropriated by the settlement right of another, it is at his peril; and if in ignorance of the prior right, that ignorance will be intended to be willful, and will afford him no equity. Public policy and the security of title require that the origin of title from the Commonwealth should not depend on parol evidence, except in cases of settlement right, where it is *ex necessitate rei*. In case of an improvement the first stroke of the ax, or other act on the ground, determines the residence, if prosecuted with diligence. A party having it in contemplation to apply to the land office for a warrant, may have his written application prepared in the county of his residence, and use or withhold it as he may think proper. It constitutes in itself no contract, but an intended application for a grant unknown to the officers of the Commonwealth until it is filed.

Is another individual who, on the same day, has his intended application prepared in writing for the same land, to be kept at bay because another had, an hour before, prepared a like application, and of which the second was only informed when he was having his prepared? The Commonwealth can know nothing of this priority of preparing the intended applications between individuals at a distance. It may be before different justices, and at places remote from each other. But

it is alleged that one who is making his preparations to apply for the land, and while in the act of doing it is informed that another has on the same day had a like application prepared, is acting *mala fide* in pursuing his application any further for the same land. Both individuals were bound to know that the writings prepared bound neither of them; they might be pursued or abandoned at their pleasure.

In such case, we think, if there was not fraud or deception, the application first filed in the land office constituted the inception of title; that should obtain the first warrant and prevail between the parties, and would be a proper application of the maxim, "*vigilantibus non dormientibus leges subserviunt.*"

An improvement made or a warrant obtained for land, with actual knowledge of even an imperfect and unreturned survey of the same land on a shifted warrant, will be postponed, though there is no contract between the State and the holders of such survey before the return: *Keble* v. *Arthurs*, 3 Bin. 29. Yet, in such case the improver or holder of the junior warrant is bound to know the usage of the land office in allowing the shifting of warrants and the acceptance of the surveys made on them, where they did not conflict with the rights of others, acquired before a knowledge of such survey. The survey made on such shifted warrant is by a surveyor who is a public officer and the agent of the State, whose office would furnish the information to any who desired it of the appropriation of the land by a survey on the ground, to satisfy the shifted warrant.

A conflict between an improver and the holder of a warrant as to priority in the origin of their respective titles, may, from the nature of the title, call for parol evidence to establish the precedence, and with respect to which we do not impugn the decision of this court on that point in the case of *Mix* v. *Smith*, 7 Barr, 75. In that case the improvement was commenced three days after the proposed application and jurat before the justices, and with the knowledge of the improver that there was such application for what was vacant land, and in respect to which the conduct of the settler under the circumstances was surreptitious. But we do not feel disposed to carry the principle there adopted any further, or ex-

tend it to a conflict of paper title, attested by warrants of different dates, the evidence of priority of title in which is that furnished by the records of the land office, and without making that priority dependent on parol evidence of precedence in their measures of preparing their intended applications in the country, or in the degree of knowledge which one may have had of the intention of the other. In such conflict between warrant holders, not claiming under an antecedent improvement, the safest rule for the security of title, and to avoid litigation, is not to go behind the dates of the warrants and open a door for parol evidence, the tendency of which would be to unsettle the priority of official grants, as well as all reliance on them as evidence of title.

In this case, there is a material circumstance in evidence in favor of the title of the plaintiff, that was not regarded or noticed by the court below, that he was a *bona fide* purchaser of the McKirnan warrant and title, and for which a deed was made to him after the decision of the Board of Property against the claim of Stewart, and without any notice of claim under the warrant to Stewart, or in the preparatory writings to obtain said warrant.

The plaintiff had, under the McKirnan warrant and survey, a title prior and better than that derived by defendants under the warrant to Stewart; and the former warrant gave to the plaintiff a constructive possession of the land in controversy that would sustain this action of trespass if there were not an actual adverse possession clearly made out on the part of the defendants. It is well settled that the owner of wild and uncultivated land is to be deemed in possession so as to maintain trespass until an adverse possession is clearly made out: *Mather* v. *Trinity Church*, 3 Ser. & R. 513; *Ward* v. *Taylor*, 1 Barr, 238. In the instruction of the court below to the defendants' third point, which has been recited, and which ruled so decisively against the plaintiff below, as to bar his recovery with the jury, this court is of opinion there was error.

From the opinion expressed, we deem it unnecessary to remark on the other errors assigned specially, as they were not pressed in the argument, and the more controlling question has been fully reviewed and decided.

For the misdirection referred to, the judgment of the court below is reversed, and a *venire facias de novo* awarded.

[1]SHOENBERGER ET AL. v. BAKER.

(22 Pennsylvania State, 398. Supreme Court, 1853.)

Trespass pending ejectment and adverse claims. From the time that a *caveat* is entered until the right to the patent is determined, in ejectment, neither party (unless in actual possession) has such a title as will sustain an action of trespass against the other. Therefore, though a party has the decision of the Board of Property in his favor, he can not maintain trespass on such title till the determination of the ejectment instituted by the opposite party.

[2]**Damages not recoverable while title undecided.** A decision giving damages to one party is not to be allowed while the contingency remains of a decision giving title to the adverse party.

Priority of applicants—Diligence no fraud. One who makes the first application for vacant land, and obtains a warrant, is to be preferred over another who makes a second application, though the former knew, when he had his application made out, that the other person had an application for the land prepared previously on the same day—the first applicant not being guilty of fraud.

Error to the Common Pleas of Indiana County.

Trespass *quare clausum fregit* for digging and carrying away ore, brought by Elias Baker v. Peter Shoenberger, George S. King and others. This suit was brought on the 30th June, 1847. It was tried before, and verdict was rendered for the defendants. See a report of the case in 6 Harris, 138, under the name of *Baker* v. *King*.

Elias Baker, the plaintiff, exhibited a warrant to William D. McKirnan, dated 6th August, 1844, a survey in pursuance of it dated 10th August and 13th and 14th September, 1844, for 59 acres 137 perches, covering the land whereon the alleged trespass was committed. McKirnan's application was executed before two justices of the peace on the evening of the 3d August, 1844, he knowing at the time that David Stewart had an application for the same land prepared previously on the same day. McKirnan enjoined secrecy as to his application and had it forwarded expeditiously to Harrisburg and first presented; and the warrant was granted as before stated.

[1] S. C. on former appeal, 14 M. R. 404.

[2] *West* v. *Lanier*, 12 M. R. 184; *Bracken* v. *Preston*, 7 M. R. 267.

McKirnan conveyed to Elias Baker by deed dated 5th December, 1846.

Stewart's application for a warrant for fifty acres, under which the defendants claimed, was made out before two justices of the peace on the morning of the 3d August, 1844, and a warrant was obtained thereon on the 7th of that month, viz., the next day after the warrant by McKirnan. No survey was made under this warrant till the 15th and 16th September, 1848, after Stewart had sold his claim to King and Shoenberger. Stewart's warrant called for fifty acres of unimproved land adjoining other land of his, purchased from Samuel Mizener, lands of Clark, Morgan and Davis.

A *caveat* dated 9th August, 1844, and another dated 11th September, 1844, were entered on part of Stewart, against the acceptance of the McKirnan survey. It was alleged in one or both of the *caveats* that the right to the land was vested in Stewart by virtue of an alleged actual settlement commenced about the year 1822, by Thomas Bracken, who sold to Samuel Mizener, from whom Stewart purchased by article of agreement, dated 1st August, 1844. He did not, in the *caveat*, claim under his warrant of the 7th August, 1844.

On 2d March, 1846, a decision of the Board of Property was made in favor of the acceptance of the McKirnan survey. On the 3d April next following an ejectment was brought to June term, 1846, by David Stewart against McKirnan and Elias Baker. This writ was not served. An *alias* writ was issued to September term, 1846. This writ was returned on 3d July, 1847, as served on McKirnan on 29th August, 1846. It was not served on Baker. The action of ejectment had not been determined when this action of trespass was tried. After the ejectment was instituted, McKirnan conveyed to Baker by deed dated 5th December, 1846.

It was alleged that Bracken, through whose alleged improvement or settlement Stewart also preferred a claim to the land in dispute, designated his boundaries in 1822, by a survey containing 262 acres and 107 perches, embracing a part of the land in dispute which was covered by the surveys both of McKirnan and Stewart. Stewart, as before alleged, on 1st August, 1844, purchased from Mizener, who had purchased from Bracken. Stewart put up a cabin on the land in dispute, and

it was alleged on the part of the defendants that he had a tenant residing in the cabin on 5th August, 1844, one day before the date of the warrant to McKirnan; that the land was occupied at intervals by different persons who were engaged in making roads and digging ore till the commencement of this suit.

It was alleged in the counter statement that the land was not occupied for any other purpose than as stated above.

On the trial Thomas H. Bracken, called on part of defendant, testified in substance, that "In the evening quite late he gave one of his horses to go for a person to vouch for McKirnan as to the land in dispute." He said McKirnan went ahead to have the application ready; that he expressed great anxiety about Stewart making an application; he enjoined secrecy on us; he wished us not to say anything about his being there; that he understood Stewart was about taking out his application that day. As he was in pursuit of the same object we went to town. He further said that he afterward met McKirnan, who said that Stewart had got ahead of him, but that he would take out an application and send it to his brother that night, and he would beat Stewart to Harrisburg, etc.

On the trial, points were proposed on the part of the defendants. The first was: If the jury believe that David Stewart, at the time he took out his warrant, believed that the land embraced within the same was not within the Bracken improvement, that on discovering the contrary he was not precluded from relying on the settlement of Bracken. 2. That if McKirnan, knowing that Stewart had an application previously prepared, had his own prepared, enjoining secrecy so that Stewart might not know it, and in addition made undue haste to forward his papers, and by such means acquired priority, his conduct was unfair and fraudulent, and gave him no title as against Stewart or those claiming under him. 3. That the pendency of the action of ejectment, which was brought in due time, was a bar to this action of trespass, for the reason that if the plaintiff recovered in the ejectment and brought an action for mesne profits, the recovery in the present case would not be a bar to that action. 4. That if Stewart and King and Shoenberger took possession of the land in dispute claiming it as their own (the plaintiff not being in actual pos-

session), built a house upon it, put a tenant in it, who, and his successor, as their tenants, continued to occupy the land till after the commission of the trespass complained of in this suit, the plaintiff can not maintain the action though the possession may not have been accompanied with the requisites necessary to make an actual settlement.

BURRELL, President Judge, in his charge, in reply to the fourth point, *inter alia*, expressed the opinion that the possession on the part of Stewart, alleged as commenced in August, 1844, was a scrambling possession not unbroken; and that such possession, or that of those following, if for the mere temporary purpose of digging ore on this or other land, was not such an actual possession as to oust the constructive possession of the true owner of the tract.

As to the second point he charged that McKirnan, having applied first and obtained a warrant, had priority over Stewart, unless it was shown that he had practiced a fraud or deception on Stewart by which Stewart was misled, delayed, or thrown off his guard, so that McKirnan got the advantage in point of time. But he expressed the opinion that McKirnan's conduct in telling the witnesses to say nothing of his application, and his haste to forward his papers, amounted to no such fraud or deception on Stewart. And if any such fraud had existed, Baker seemed to occupy the position of a purchaser without notice, and should not be affected by it.

He further said that as to the portion of the land included in the plaintiff's survey, and which is covered by Stewart's survey, but not included in the designation of boundary by Bracken, the plaintiff seemed to have the better title. That there is a portion of the land covered by both surveys, and also included in Bracken's designation of boundary. As to this, the plaintiff contends that Stewart, by having included this portion in the survey under his warrant, lost the benefit of his prior title under the Bracken improvement; and this, we think, is the result.

The third point was answered in the negative. He observed that the plaintiff, in this action of trespass, was the defendant in the ejectment, and that if he succeeds in the ejectment he can not follow it by an action for mesne profits, having been in possession himself. That such action can be brought only by a plaintiff in ejectment who recovers.

September 30, 1852, verdict for plaintiff for $350.75.

It was assigned for error: 2. In refusing to permit the defendants to show that they and those under whom they claimed entered on the land in question before the survey on the McKirnan warrant; that the land was incapable of use, except for taking ore and timber; that their occupancy continued from the building of the house on 5th August, 1844, till the commencement of this suit, etc. 3. In charging in answer to the first point, to the effect that a settler, after designating his boundaries, may take out a warrant without reference to his settlement, and include in his survey a part of the unimproved land included in his designation of boundary as a settler; but that if he does so he abandons his settlement right as to the part included in the survey. 4. In the answer to the second point, as to the effect of the knowledge and conduct of McKirnan. 5. In answering the third point in the negative. 6. In the answer to the fourth point as to the original possession by the tenant of Stewart in August, 1844, and as to the possession of others following him.

BANKS, for plaintiff in error.

STEWART, for defendant in error.

The opinion of the court was delivered by BLACK, C. J.

This case has some points of more than usual interest, which are presented in the charge of the court below with great clearness and precision. But after considering it with much care we have all reached the conclusion that we must reverse the judgment for a reason apparently not much thought of on the trial, and which, as it puts an end to the action, makes any reference to the other questions unnecessary.

The suit is trespass for digging ore on land to which both parties claim title. The plaintiff is the owner of a warrant to William D. McKirnan dated the 6th of August, 1844. David Stewart, who has since conveyed to the defendants, took out a warrant one day later. Their applications are dated both on the same day (namely September 3d) but Stewart's was in the

morning and McKirnan's in the evening, after he knew of Stewart's. The somewhat doubtful question which arose on these facts—I call it doubtful because there are decisions upon it by this court which seem to conflict with one another—came up before the Board of Property on a *caveat*, and was there decided (March 6, 1846) in favor of McKirnan. Within six months afterward ejectment was brought by the losing party, agreeably to section 11 of the act of 3d April, 1792, which is still pending.

We hold the opinion which the court of common pleas did not, that the right of either party to maintain trespass against the other for an injury done to the land in dispute, is suspended until the title shall be finally settled in the ejectment. We do not mean to say that one in actual possession may not bring trespass for an interference with any of those rights which the law gives to every peaceable occupant. But in this case the plaintiff recovered by virtue of his title alone, and the constructive possession supposed to result from it; and that, too, in the face of some evidence (we do not say enough) to show that his adversary had the possession.

The statute makes the determination of the Board of Property conclusive upon all parties to the *caveat* who are *sui juris* and not beyond sea, unless ejectment be brought within six months. It gives the action by way of appeal from that decision, and when judgment is pronounced by the court, the patent which issues thereupon is a full and perfect title to him who gets it. But in the meantime no patent can issue to either, because, until the suit is ended, one has as good a right as the other. Who shall have the patent, is a question which can be tried in no other way than that designated by law. The judgment will be conclusive when it is rendered, but we have no authority now, in a different action, to anticipate what it will be by considering what it ought to be.

When a statutory remedy is given it must be strictly pursued, and all common law proceedings to the same end cease to be available. If the plaintiff succeeds in getting a patent, under the law which authorizes the ejectment, his wrongs can then be fully redressed. His title will not only be full, perfect and indisputable, but it will relate back to the period of its inception and give him all the rights which he would have

had under it if no *caveat* had been entered. In the meantime the writ of estrepement, or a bill in equity, will prevent any irreparable waste. The act covers the plaintiff's case; it serves his whole purpose and gives him all he can ask without grasping in advance at the fruits of a title which he has not yet got, and which he can not be sure that he ever will get.

On the other hand, suppose, what is possible enough, that the plaintiff, after recovering in the trespass, should lose in the ejectment; he would then have in his pocket the amount of this judgment, with conclusive evidence on the record that it does not, and never did belong to him; and while the law would acknowledge the error of giving him damages for a trespass which was never committed, it would be powerless to make him refund, since it furnishes no remedy for a wrong perpetrated in pursuance of its own process, or in accordance with its own decrees. The absurd inconsistency of holding that one who is the absolute owner of land shall pay damages for using it to another whose claim is utterly void, would scandalize the administration of justice.

The ejectment is to be determined without reference to anything except the opposing title. The scales are so adjusted as to contain nothing, on either side of them, but the legal rights of the parties under their respective applications, warrants and surveys; and care has been taken to blow away even the dust of the balance. The party who has the decision of the board in his favor is fictitiously deemed to be in possession, but it is provided in the act that "such supposed possession shall, nevertheless, have no effect upon the title." The object is to get a decision precisely such as the board ought to have given upon a view of the papers in the land office, and such facts *in pais* as may legally modify the effect of the recorded documents. But in an action of trespass the result may often depend on mere accidental circumstances. Possession, for instance, of one or the other party may be a fact so controlling, that the question of title would be left wholly out of sight. This case, indeed, came very near being one of that kind. If the actual occupancy of the defendants had been a little better made out, they would have taken the verdict on that ground alone. If this had happened, could the plaintiff, in case he should get the patent afterward, recover for the same tres-

pass in another action upon any principle except that the first action would not lie? I ask this question not to answer it (for that would carry us beyond the record), but merely to suggest a difficulty which may as well be avoided. At any rate, here was a trial of the title in a way not authorized by the statute, in which the parties were exposed to the danger of a decision on grounds different from those on which it might be finally settled.

If the Board of Property had authority to decide upon the title finally or with an appeal directly to this court, the impolicy of permitting a different court to adjudicate the same question in another form of action would be very apparent. In principle, the case is made no way different by the fact that the appeal from the board is to the common pleas. A tribunal to which an act of assembly gives appellate jurisdiction has no more right to take original cognizance of the same subject, while the appeal is pending, than it would have if the right to hear the appeal had been given to another.

We therefore decide that from the time the *caveat* is entered, until the right to the patent is finally determined, neither party (supposing him not in possession) has such a title as will sustain trespass against the other. An action brought afterward by the patentee will lie for all injuries committed pending the dispute, and this, together with the writ of estrepement, is a sufficient protection to him who is finally adjudged to be in the right. It would not be proper now to say what remedies may be had against strangers. It is enough to add that no rule here laid down applies to actions by or against persons not parties to the *caveat*.

Although it be not necessary for the purposes of this case to advert to any other of the points ruled below, yet, as the others are fairly before us and were carefully and well argued, we have concluded, for the purpose of saving future trouble, to express our conviction that there is no error in what the court said about the warrants. The earlier warrant is the better title. We can not recede from the rule which this court established when the case was here before. It is the settled policy of the law, to make land titles depend as much as possible on written evidence. When two warrants are taken out on the same day, the record will show which is the

elder one. But the priority of applications which bear even date can only be determined by parol, and then, according to the doctrine of the plaintiff in error, the right is not settled without showing that the latter applicant knew what had been done by the other. In a title twenty years old, what chance would there be of proving the truth concerning such facts as these? Great uncertainty would be the necessary consequence. And *cui bono*? Merely to restore to a slow man the advantage which another has achieved by swifter motion. Of course, I am speaking of cases in which there is no fraud. A party does no wrong who desires vacant land and tries to get it, though he may know that another is moving under the same impulse. It is no imputation on the fairness of the race that the winner was behind at the start.

Judgment reversed and *venire de novo* awarded.

LEWIS, J., dissented from so much of the opinion as passed upon the titles of the parties.

SHAW v. WALLACE ET AL.

(25 New Jersey Law, 455. Supreme Court, 1856.)

Lease as to surface—Contract as to mines. An agreement compelling a party to raise a certain amount of ore annually and concerning the use of farming land, *construed* as a lease of the surface but not of the mine.

Mines not implied, where specially mentioned. The general principle that a lease carries with it the mines upon the land, applies only when the contract relates to the land generally, without exception or reservation.

[1] **Trespass by contractor against owner.** A contract for the working of a mine, though not a lease, may give such exclusive possession of the mine as to enable the contractor to maintain trespass against the owner.

Contractor opening new mines. A contract by which a party is authorized to raise ore out of the mines on a designated tract, at a stipulated price, confers no authority to open new mines or to sink new shafts or slopes, except so far as such shafts or slopes may be necessary to the proper and successful working of the mines already opened.

[2] **Measure of damages—Contractor interfered with by owner.** In trespass by a contractor under obligations to produce a certain output of ore, against the owner for opening a new mine or shaft, it is error to instruct

[1] *Illinois Coal Co.* v. *Caldwell*, 17 Ill. App. 409.

[2] *Hoosac M. Co.* v. *Donat*, 16 Pac. 157.

the jury that the proper measure of damages was such profits as the plaintiff would have realized by raising the ore which was raised by the defendant at the rate per ton which the plaintiff was entitled to receive under his contract.

Idem—Nominal damages. Unless the acts of defendant interfered with the beneficial working of plaintiff's mine, they were entitled to nominal damages only.

Error to the Morris Circuit Court.

An action of trespass *quare clausum fregit* was brought in the Morris Circuit Court, by John Wallace and James McKenna against Forbes Shaw.

The declaration contained three counts:

The first count avers that the defendant, on the 1st day of May, 1850, and on divers other days, etc., broke and entered the close of the plaintiffs, called the Hance and Dickerson Mine, in Randolph township, containing forty-one acres, and sunk divers pits, shafts and holes, and from thence took large quantities of earth, soil, stones, iron ore, and other ore of the plaintiffs, to wit: 5,000 tons of iron ore, of the value of $5,000, and carried the same away and converted it to his own use.

The second count charges the defendant with breaking and entering the same close at same time, and trampling down, consuming and spoiling the grass and herbage there growing, of the value of $30, and with taking and carrying away earth, stones and ore of the like quantity, quality and value, as mentioned in the first count.

The third count avers that defendant, at same time, broke and entered a certain other iron ore mine or vein of ore of the plaintiffs, called the Hance and Dickerson Mine, and took possession of it, and kept possession, without the leave or license, and against the will of the plaintiff, to wit, from the 1st day of June, 1851, till the commencement of the suit, and dug out of said mine or vein 5,000 tons of ore, and converted the same to his own use, and prevented and hindered the plaintiffs from having possession, occupation and use of said mine or vein, and from working the mine and raising the ore, to wit, 5,000 tons of ore, which otherwise the plaintiffs could and would have raised from the said mine or vein; and the plaintiffs were thereby deprived of, and obliged

to lose, and did lose, divers great gains, profits and advantages, which would otherwise have accrued to them from raising ore from said vein, and from disposing of the same, as they could have done.

To this declaration the defendant pleaded the general issue.

The plaintiffs had possession of the premises under an agreement made by them with one David Thomas. While the plaintiffs were in possession, the defendant entered upon the premises, under a contract with the said David Thomas, sunk a shaft, and commenced working a new mine. The plaintiffs claimed that, by virtue of their agreement with Thomas, they had the exclusive possession of the premises, including the mines and surface of the soil.

The agreement was as follows:

"Articles of agreement, made and executed this seventh day of May, A. D. 1850, between John Wallace, Peter Kinlock and James McKenna, all of the county of Morris, in the State of New Jersey, of the first part, and David Thomas, of the village of Catasaqua, in the county of Lehigh and Commonwealth of Pennsylvania, of the second part, witnesseth: that the said parties of the first part, the survivors and survivor of them, severally promise and agree to raise a quantity of clean and merchantable iron ore, not less than 5,000 tons per annum, during the term of two years, commencing from the first day of May, now past, out of the mines on the land and premises of Thomas Earp and Theodore Mitchell, in the township of Randolph, in the county of Morris, in the State of New Jersey, which said premises are known by the name of the Hance and Dickerson Mine, and were conveyed by said Hance and Dickerson to said Earp and Mitchell, containing forty-one acres, be the same more or less, and deliver said ore at a convenient place on the mine bank. Said parties of the first part to have the privilege of entering on said premises, and commencing operations under this agreement at any time previous to said 1st of May. And the said David Thomas, for himself, his executors and assigns, doth covenant and agree to remove said ore from said bank to the Morris canal at his cost and expense, there to be weighed by his agent or overseer, and to allow for the same $1.25 for every ton of the weight of 2,240 pounds of clean and merchantable ore, free from dirt, rock and other

impurity, payable to them in monthly payments, as follows: All the ore delivered during any month at the canal, and there weighed as aforesaid, to be paid for at the end of said month; and the said David Thomas will use due diligence in the hauling away of said ore, so as not to cause any unreasonable accumulation thereof at the said bank; and the said David Thomas further agrees to find the whims, chains, timber and planks required by the said party of the first part for their operations under this agreement, and to permit the said party of the first part to use and occupy the dwelling house and smith shop on the said premises, and will also find a stable for their use; and further, will permit them to use the tops of trees that shall or may be felled on said premises for the use of the mine for fuel for the hands occupying said house; and they, the said party of the first part, shall also have the use of the land hereinbefore described, and also the use of the lot lately bought of William Minton, containing fifty-two acres, for farming purposes, during said term free of rent, on condition of keeping said building and said land in proper and husbandlike order, condition and repair. And the said party of the first part covenant and agree to and with the said David Thomas to work the said mine or mines in a proper and systematic manner, to the satisfaction and approval of the overseer appointed by the said David Thomas, and to deliver the same, together with the whim, chains and apparatus, in proper working order and condition, also the building in proper order and repair, and the land in proper order, at the end of said term.

"And in case the said party of the first part, the survivors or survivor of them, shall neglect or refuse to make the proper selection of the ore from rock, dirt and impurity, then the same shall be so selected by the said overseer, at the cost and expense of the said party of the said first part. And it is expressly understood, by and between the said parties to this agreement, that in case the said party of the first part, the survivors or survivor of them, shall neglect to raise the full quantity of 5,000 tons of ore in the first year of this agreement, then this contract shall cease and determine on the first day of May, 1851, and they shall be held to surrender the possession of the premises on the said 1st May, 1851. Should, however, the ore run out, or the said party of the first part

have to contend with an extraordinary quantity of water that can not be controlled by horse power, then the said David Thomas agrees to waive his claim to the said full quantity of ore in said first year. And the said parties to these presents do hereby, for the full, fair, and entire performance of all and every the condition, covenant, terms and stipulations herein contained, by them respectively made and entered into, bind themselves, each to the other, in the penal sum of $1,000, firmly by these presents. In witness whereof," etc.

Upon the interpretation of this agreement, the character of the plaintiffs' possession depended; it was offered and admitted in evidence upon the trial, and upon its construction the whole case turned.

The cause was tried in the Morris Circuit, before Justice Ogden, April term, 1852, and the jury rendered a verdict of guilty, upon which judgment was afterward entered for twenty dollars damages.

On the trial, the court charged the jury that the written agreement offered in evidence by the plaintiffs, executed by David Thomas of the one part, and John Wallace and others of the other part, gave to the plaintiffs such exclusive possession of the *locus in quo* as to enable them to sustain this action of trespass against the defendant, though he entered under the said David Thomas; and that the plaintiffs were entitled to recover, as damages, such profits as the jury believed they would have realized by raising the ore, which was raised by the defendant at the rate of one dollar and thirty-one cents per ton; and that there was evidence from which the jury could lawfully find that profit to be six cents per ton, and that damage should be allowed, as well for the ore raised before notice to the defendant as after.

To this charge of the court the defendant below excepted, and a bill of exceptions was allowed and sealed accordingly, and errors assigned thereon.

The case was argued at February term, 1856, before the CHIEF JUSTICE, and OGDEN, ELMER and HAINES, Justices, by WHELPLEY, for the plaintiff in error, and VANATTA, for defendants.

THE CHIEF JUSTICE.

The first error assigned is, that the judge instructed the jury that the plaintiffs had such exclusive possession of the *locus in quo* as to enable them to maintain trespass against the defendants. That the plaintiffs were in the actual possession of the premises is not disputed. The character of that possession is the point in controversy. The plaintiffs entered into possession of the premises under an agreement executed by David Thomas, of the one part, and the plaintiffs of the other part, on the 7th of May, 1850. The defendant entered and committed the alleged trespass under the said David Thomas, during the continuance of his agreement with the plaintiffs. The defendant insists that the plaintiffs had not such exclusive possession of the premises as to enable them to maintain trespass against Thomas, or against the defendant, who entered by his authority. The character of the plaintiffs' possession must depend upon the interpretation given to the agreement under which they entered. The agreement is clearly not a lease of the mine. It is, in terms and effect, an agreement on the part of the plaintiffs to raise a certain quantity of ore per annum for two years, at a stipulated price per ton. The plaintiffs pay no rent for the mine. They are paid for their labor. In addition to the price per ton to be paid for their services, they are to be furnished with whim, chains, timber, and plank required for their operations, the use of a dwelling house and smith shop on the premises, a stable, the tops of trees for fuel for their hands occupying the house, the use of the land and of another tract of fifty-two acres, for farming purposes during the term free of rent. In regard to the land and buildings, the agreement may be construed as a lease, the defendants paying rent by their labor in the mine. But admitting it to be technically a lease of the soil, or surface, the lease clearly does not extend to the mine. The agreement distinguishes between the land and the mine, the former going to the use of the plaintiffs for agricultural purposes, while the latter is to be worked for the benefit of the owner, in a manner totally repugnant to its use by the plaintiffs as leased property. The general principle, therefore, that a lease of land carries with it the mines upon

the land, can have no application. The rule only applies where the contract relates to the land generally, without exception or reservation: *Keyse* v. *Powell*, 2 El. & Bl. 132.

Whatever may be the precise character of the contract, whether technically a lease or not, the plaintiffs were clearly entitled to the exclusive possession of the land or surface of the tract. They are, by the agreement, to have the use of the house and the use of the land. Their possession of one is as exclusive as that of the other. Thomas reserved no right of entering upon the land for the purpose of mining or for any other purpose, except for carrying away the ore, and also (it would seem by necessary inplication) for cutting timber for the use of the mine. The plaintiffs' possession of the surface alone would be sufficient to maintain this action, though it be admitted that they had not the exclusive possession of the mine itself. There was, technically, a breach of the plaintiffs' close, an entry upon their possession, by the defendants, without right.

But the plaintiffs had also, under their contract, the exclusive possession of the mine itself. This construction of the contract is necessary to enable the plaintiffs to execute their part of the agreement, and is in accordance with the obvious intention of the parties. The plaintiffs were to work the mine; they were bound to raise five thousand tons of ore per annum; they had the entire mine (so far at least as it had been opened) to carry on their operations. They were entitled, under their contract, to work without let or molestation from others. True, the mines were to be worked in a proper and systematic manner, to the satisfaction and approval of the overseers appointed by the owner. But this no more gives the owner joint possession of the mine, than would a contract on the part of a tenant to work a farm in a proper manner and with a suitable succession of crops, to be approved by the landlord, give the landlord joint possession of the farm.

The plaintiffs, moreover, covenant to deliver the mines, with the whim, chains and apparatus, in proper working order and condition, also the building and the land in proper order, at the end of the term. They also covenant, upon failing to raise the stipulated quantity of ore, to surrender the possession of the premises on the 1st of May, 1851. This

language clearly indicates that, according to the understanding of the parties, the possession of the mine, as well as of the land and buildings, was in the plaintiffs.

There was, therefore, no error in the charge of the court, that the plaintiffs had such exclusive possession of the *locus in quo* as to enable them to maintain trespass against the defendant for the wrong complained of.

The second and remaining errors assigned are, that the judge erred in his charge to the jury touching the measure of damages. The jury were instructed that the plaintiffs were entitled to recover, as damages, such profits as the jury believed they would have realized by raising the ore which was raised by the defendant, at the rate per ton which the plaintiffs were entitled to receive under their contract. This charge manifestly assumes, as the true interpretation of the contract, that the plaintiffs not only had the possession of the entire tract for agricultural purposes, but that they also were entitled to open new mines or shafts anywhere upon the tract where ore could be found. But this is neither within the express terms or natural import of the agreement. The plaintiffs covenant to raise not less than 5,000 tons of ore per annum, out of the mines on the land and premises of Thomas Earp and Theodore Mitchell, known by the name of the Hance and Dickerson Mine, containing forty-one acres, more or less. By the terms of the contract, the plaintiffs are entitled to raise the ore out of the mines on the tract of forty-one acres. Now a mine, properly speaking, is the pit or excavation in the earth from which the ore is taken. The term is certainly used to include the bed or vein of ore into which the pit enters, so far as may be necessary to the working of the mine, and the whole series of shafts and subterranean passages and chambers connected with it. But neither in ordinary parlance, nor in strict technical language, is a mine understood to indicate the entire ore bed with which the shaft may be connected. As by a quarry we understand, not an indefinite extent of stone or rock which may be worked, but the spot where the rock is quarried. The ore may extend indefinitely, but the mine is the pit from whence it is extracted.

There is no authority given in the contract to the plaintiffs to open new mines, or to sink new shafts or slopes, except so

far as such shafts or slopes may have been necessary to the proper and successful working of the mines already opened.

That this is the true interpretation of the contract, as understood by the parties themselves, is abundantly manifest from the evidence in the cause. Almost immediately after this contract was made one of the contracting parties having separated from his associates, opened a shaft near the mine where the plaintiffs were at work, without objection on their part. The contract for opening the shaft now in controversy was offered to one of the plaintiffs, who declined to undertake it, except at a price which the owner refused to pay. The contract was then made with the defendant, in the presence of one of the plaintiffs, and over $350 was paid for sinking the shaft. The work was carried on under the immediate observation of the plaintiffs, and without objection or question on their part; and it was not until the mine had been opened, and was proving remunerative, that the plaintiffs attempted to interfere with the right of the defendant to carry on the work. This evidence, if not competent to establish the defense of leave and license under the pleadings in the cause, is both competent and material as showing the true meaning of the contract and the understanding of the parties in relation to it: *Chapman* v. *Bluck*, 4 Bing. (N. C.) 187; Chit. on Con. (9th Ed.) 88.

The evidence shows no connection whatever between the shaft sunk by the defendant, and the vein or bed of ore with which the plaintiffs' mine was connected.

But, admitting that the shaft sunk by the defendant had connected with the same ore bed in which the plaintiffs were at work, it could in no wise have injured the plaintiffs unless it appeared in evidence that it interfered with the beneficial working of the plaintiffs' mine. But there is no evidence that it interfered at all with the plaintiffs' legitimate operations; that they ever could or would have opened the mine to that spot, or, if they had done so, that the operation would have proved remunerative. So far as appears from the evidence, the expense of opening the slope by the defendant was greater than all the profits which the plaintiffs would have realized from that time until the expiration of their contract, had they raised all the ore which they were bound to raise during that time, and far more than they had raised at any other period of their contract.

The plaintiffs, under the evidence, were entitled to but nominal damages. In this particular, the charge was erroneous. The judgment must, therefore, be reversed and a *venire de novo* awarded.

Elmer and Haines, Justices, concurred. Ogden, J., dissented.[1]

McCarron et al. v. O'Connell.

(7 California, 152. Supreme Court, 1857.)

Recovery by plaintiff on his possession. Possession in the plaintiff is sufficient to enable him to maintain trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages.

Bill of sale of mining claim. A bill of sale, not under seal, is insufficient to convey a mining claim.

[2]**Evidence in trespass against several defendants.** Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *Aliter*, if a joint trespass has been proved.

Appeal from the District Court of the Ninth Judicial District, County of Shasta.

This was an action of trespass against a number of defendants for breaking plaintiff's dam, and destroying plaintiff's ditch and flume.

The defendants file several answers. That of O'Connell merely denies the trespass. The answer of some of the defendants denies that plaintiffs were the owners of the property.

It was proved on the trial, by one of the former owners of the ditch property, that it was sold by them to plaintiffs, by a

[1] Ogden, J., filed a dissenting opinion, holding that the plaintiffs were entitled to full damages; and that they had a right to the ore on the whole tract whether found by sinking new or working old mines: 25 N. J. Law, 463.

[2] *Williams* v. *Sheldon*, 10 Wend. 654.

bill of sale not under seal, and that plaintiffs were put in possession at the same time, and were in possession when the acts complained of were committed.

The complaint alleges a joint trespass of all the defendants, no proof of which was introduced. A separate trespass of the defendant O'Connell, only, was proved, and judgment was rendered against him, from which he appealed.

Z. MONTGOMERY, for appellant.

SPRAGUE & MCMURTRY, for respondents.

HEYDENFELDT, J., delivered the opinion of the court, MURRAY, C. J., concurring.

Possession in the plaintiff is sufficient to enable him to recover against a trespasser, and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. So in this case, the bills of sale, not under seal, although insufficient to convey the right intended, do not weaken the claim of the plaintiffs under their possession. Besides this, the only issue made by the appellants was as to the fact of the trespass, and thus all of the errors assigned, which affect the questions of law, are disposed of.

The remaining one relies upon the insufficiency of the evidence to sustain the verdict. It seems that although several defendants are declared against jointly, no joint trespass was proved, but only a trespass by one. Now, it is true, that if a joint trespass had been proved, the plaintiffs could not have been allowed to waive that, and give evidence of another trespass against one only. But such is not the case here; a trespass is found against one only, and the plaintiffs are entitled to recover.

Judgment affirmed.

F. M. ROWE v. J. W. BRADLEY ET AL.

(12 California, 226. Supreme Court, 1859.)

Vendor as witness. A vendor who has not received all his purchase money is not a witness disqualified by interest in an action of trespass brought by his vendee against a third party.

Collecting execution by working a gold mine. The fact that a judgment debtor is found upon the mining ground of plaintiff is no justification to an officer holding an execution against such debtor in going upon such land and digging and taking the gold to satisfy the writ.

No ouster is necessary to maintain trespass. Any unlawful entry is sufficient.

An officer putting a receiver in possession of property of a party against whom he has no process is a trespasser.

Failure to deny damages. In trespass, where defendant fails to deny the amount of damages alleged in the complaint, although the alleged cause of the damage be denied: *Doubted* whether the amount of damages was put in issue.

Points not made below will not be considered above.

Appeal from the Fourteenth District, County of Sierra.

The facts, as disclosed by the opinion of the court, are as follows: This was an action of trespass, in which the plaintiff complains that in April, 1857, he owned and possessed a third part of a tract of mining ground, and that defendants broke into and trespassed upon it, and dug up and converted the dirt and gold-bearing earth to the value of $2,000.

The defendants answered, denying that the claim was the property of the plaintiff, or that they committed any trespass on *the property* of the plaintiff, and generally denying all the allegations of the complaint. And further say that "George Davis, one of the defendants herein, is deputy sheriff in and for the county of Sierra; that by authority of his said office, and by virtue of an attachment issued from the District Court of the Fourteenth Judicial District in and for Sierra County, in an action before said court in which J. W. Bradley was plaintiff and F. M. Rowe defendant, he levied upon or attached the said F. M. Rowe's interest in the mining claim described in plaintiff's complaint in this action; that

bill of sale not under seal, and that plaintiffs were put in possession at the same time, and were in possession when the acts complained of were committed.

The complaint alleges a joint trespass of all the defendants, no proof of which was introduced. A separate trespass of the defendant O'Connell, only, was proved, and judgment was rendered against him, from which he appealed.

Z. MONTGOMERY, for appellant.

SPRAGUE & MCMURTRY, for respondents.

HEYDENFELDT, J., delivered the opinion of the court, MURRAY, C. J., concurring.

Possession in the plaintiff is sufficient to enable him to recover against a trespasser, and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. So in this case, the bills of sale, not under seal, although insufficient to convey the right intended, do not weaken the claim of the plaintiffs under their possession. Besides this, the only issue made by the appellants was as to the fact of the trespass, and thus all of the errors assigned, which affect the questions of law, are disposed of.

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Collecting execution by working a gold mine. The fact that a judgment debtor is found upon the mining ground of plaintiff is no justification to an officer holding an execution against such debtor in going upon such land and digging and taking the gold to satisfy the writ.

No ouster is necessary to maintain trespass. Any unlawful entry is sufficient.

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The defendants answered, denying that the claim was the property of the plaintiff, or that they committed any trespass on *the property* of the plaintiff, and generally denying all the allegations of the complaint. And further say that "George Davis, one of the defendants herein, is deputy sheriff in and for the county of Sierra; that by authority of his said office, and by virtue of an attachment issued from the District Court of the Fourteenth Judicial District in and for Sierra County, in an action before said court in which J. W. Bradley was plaintiff and F. M. Rowe defendant, he levied upon or attached the said F. M. Rowe's interest in the mining claim described in plaintiff's complaint in this action; that

thereupon the plaintiff in this case claimed the property as his own, and the said sheriff, in conformity with the statutes in such cases made and provided, proceeded to try and determine the rights of property; that the jury called to determine said matter decided in favor of said plaintiff, J. W. Bradley, as will more fully appear by reference to the proceedings then and there had, which defendants pray may be made a part hereof.

"And that afterward, by virtue of a judgment and execution issued from said court, and to him directed, and by virtue of said decision of said jury, and of the statutes in such cases made and provided, satisfied the claim of said J. W. Bradley out of the said F. M. Rowe's interest as aforesaid, as the proceedings in said case on record will more fully show; which record, return and proceedings, defendants introduce and make a part of this answer." The answer was sworn to by Davis. Afterward, defendants amended their answer to this effect: "That they have been informed that plaintiff claims to have purchased the mining claim mentioned in his complaint from one James Finney; but defendants aver that, if such conveyance was made, it was in fraud of the rights of defendant, J. W. Bradley, and made for the purpose of delaying and hindering him from collecting a debt due from F. M. Rowe to him, which debt was the same sued for in the case of *J. W. Bradley* v. *F. M. Rowe* in this court, the record of which suit is made a part hereof; and that said purchase was made by F. M. Rowe, defendant in the last mentioned suit, and the money therefor furnished by him, and the name of A. C. Rowe used in said conveyance from Finney to deceive and defraud said defendant, J. W. Bradley." This was sworn to by Bradley.

One Finney, the vendor of the claim to Rowe, to whom was due a part of the purchase money, was examined as a witness. It is assigned as error that he was admitted to testify when he was incompetent. The question before the jury was not as to the original title as it stood before the witness sold, but as to whether the claim belonged to plaintiff, F. M. Rowe, as whose property it was levied on by the officer.

The cause was tried by a jury, and a verdict had for plaintiff for $2,000, on which verdict there was judgment, from which the defendants appealed to this court.

H. B. CROSSETTE and R. H. TAYLOR, for appellants.

VANCLIEF & STEWART, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, J., concurring.

One Finney, the vendor of the claim to Rowe, was examined as a witness. It is assigned as error, that he was admitted to testify when he was incompetent. The question before the jury was not as to the original title as it stood before the witness sold, but as to whether the claim belonged to plaintiff, F. M. Rowe, as whose property it was levied on by the officer.

It is true that the witness had not been paid all the purchase money; but this made no difference. This was not an action to try the title; and if it were, in this state of the question before the jury, the vendor, for all that appeared, was a competent witness.

Another assignment of error is, that no trespass was committed, because the officer found F. M. Rowe, the debtor, in attachment and judgment, in possession, and therefore had a right to seize the property. But the very question of fact was, who was in possession? And the possession of real estate usually follows the ownership. The mere fact that F. M. Rowe was on A. C. Rowe's ground, is no justification to the officer to go there and dig up the soil, or take the earth or gold taken from the land.

The next error assigned is, that no ouster was made, but merely the rights, title and interest of the judgment debtor attached; but no ouster in this sense is necessary to maintain an action of trespass; any unlawful entry is enough. And the officer, when he put a receiver in possession of plaintiff's property, or asserted through himself or another an unlawful dominion over another's property, is a trespasser. There is no difference between the officer going, without right, upon the plaintiff's land and getting Lyre to seize or take the plaintiff's gold or earth, and doing it himself.

In both cases, such an act is a trespass and conversion; and all concerned, aiding and abetting, are original trespassers. It is not the case of a co-tenant paying over money or gold

dust to the sheriff, but the sheriff getting the co-tenant to aid him in seizing and taking property of the plaintiff.

The next objection is, that the damages were excessive. There was some evidence tending to show that in a few weeks the amount coming to the plaintiff's share was $1,745. The jury might infer that some additional amount was taken out the balance of the time. Besides, there is no specific denial of the amount of damages laid in the complaint, though there is of the alleged causes of damage.

It may well be doubted, indeed, if the answer put in issue any fact except the fact of ownership, and of the levy, etc., as the property of F. M. Rowe.

Some technical exceptions are taken, but they were not made below, and we can not consider them for the first time here.

The judgment is affirmed.

HENSHAW ET AL. V. CLARK AND 103 CHINAMEN.

(14 California, 460. Supreme Court, 1859.)

Miners' entry upon private land. Miners have no right to enter upon private lands—the minerals have passed with the soil.

Classes of irreparable injury—Insolvent defendants—Chinese. Extracting minerals, flooding lands and excavating ditches are in the nature of irreparable injuries, as to which the denial of injunctive relief is tantamount to the denial of all protection; and the fugitive nature of the defendants is also to be considered.

Appeal from the Fifteenth District. The opinion states the facts.

W. H. RHODES and HEYDENFELDT, for appellants.

P. L. EDWARDS, for respondent.

FIELD, C. J., delivered the opinion of the court, COPE, J., concurring.

This is a suit on the equity side of the court, to restrain the

defendants from committing trespass, in the nature of waste, upon the premises of the plaintiffs. The premises are fitted, to a limited degree, for agricultural and grazing purposes, and contain in their entire extent deposits of gold. The plaintiffs derive their title from a grant of the former Mexican Governor of California, and a patent issued, upon its confirmation, by the United States. The acts charged as trespasses consist in excavating ditches and digging up the soil, and in flooding a portion of the premises to the extent of about fifty acres, with water elevated from Feather River, by means of machinery constructed for that purpose. The defendants admit the commission of these acts, and in substance allege, by way of justification, that the grant and patent, assuming that the plaintiffs derived title to the premises thereunder, conveyed no right to the gold and other minerals which the premises contain; that the defendants are miners, and as such committed the several acts charged against them, in their business of mining; that those acts were accompanied with no more damage to the premises than the business necessarily required; that, as miners, they had good right and authority to enter upon the premises, or any portion thereof, for the purpose of mining and extracting the precious metals from the soil, and to use the premises and materials found thereon necessary for that purpose.

The preliminary injunction, granted on the filing of the complaint, was dissolved, and from the order of dissolution the appeal is taken. On the motion to dissolve, affidavits on behalf of the respective parties were read, in addition to the pleadings. Some criticism is indulged in in reference to the effect of the allegations of the complaint and the denials of the answer, which we do not consider, for we are of opinion that the pleadings, though not very formally drawn (and which might be amended to their great improvement), present the real matter in controversy between the parties.

The questions raised by the record relate, first, to the right of miners to enter upon private land and subject it to such uses as may be necessary to enable them to extract the precious metals which it may contain; and, second, to the right of the owner to the equitable interference of the court to restrain, by injunction, such entry upon and use of his land.

For the decision of the first question we have only to refer

to the opinion recently rendered in the case of *Boggs* v. *Merced Mining Co.*, 14 Cal. 279, in which we considered the precise point here presented. It is evident that if the defendants possess, against the true owner of the land, the rights they assert, it must be on the ground that the mineral does not pass with the soil, but belongs either to the United States, or to the State of California, and that they have an effectual license to enter upon the premises and extract the same; and in the case cited, we held that there was no such license from either government.

Upon the second question, we have no doubt that the plaintiffs are entitled to the injunction. The injuries which are the subject of complaint are of a character calculated to destroy the entire value of the land for all useful purposes. Those which result from flooding are continuous in their nature, necessarily effecting the entire exclusion of the owner. Those which consist in excavating ditches and in digging up the soil are irreparable, in the sense that the former condition of the property could not probably be restored without an expenditure exceeding the original value of the land. The defendants, with the exception of one, are Chinamen—with no permanent places of residence, and of little pecuniary responsibility—against whom, when the gold is once extracted, and they have departed from the ground, a claim for redress for injuries committed to the freehold could seldom, if ever, be successfully enforced. A denial of the preventive remedy by injunction in such case would be tantamount to a denial of all protection.

"Formerly, indeed," says Story, in considering the cases in which injunctions are allowed, and the grounds of their allowance in restraint of trespass, "courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to the property would be ruinous or irreparable, or *impair the just enjoyment of the property in the future.* If, indeed, courts of equity did not interfere in cases of this sort, there would be (as has been truly said) a great failure of justice in the country." (Story's Eq. 928.)

It follows from the views we have taken that the order dis-

solving the injunction must be reversed, and the court below directed to restore the injunction until the final hearing, when the propriety of either dissolving it or of rendering it perpetual, will be determined according to the merits of the case.

Ordered accordingly.

DUNDAS V. MUHLENBERG'S EXECUTORS.

(35 Pennsylvania State, 351. Supreme Court, 1860.)

Co-trespasser a competent witness. A co-trespasser, not joined as a defendant, is a competent witness for the plaintiff, to establish the trespass in an action for money had and received, in which the tort is waived.

[1] **Lessors held for tenant's trespass.** The lessors of a coal vein are liable as trespassers for the act of their tenant, in mining coal in the land of an adjoining owner; they having leased the particular vein of coal, authorized the sinking of the slope by which it was reached, and contributed to its expenses, believing that it would not extend beyond their own line; and the tenant having, by means of this slope, taken out coal from the adjoining property, and paid for the greater part of it to his lessors, a certain rent for each ton of coal mined by him.

[2] **Waiver of tort.** In such case the plaintiffs may waive the tort, and sustain an action for the value of the coal, as so much money had and received to their use.

Error to the Common Pleas of Schuylkill County.

This was an action of *assumpsit* by the executors of Henry A. Muhlenberg, deceased, against James Dundas and George M. Stroud, for the value of a quantity of coal taken by John Bittinger, the defendants' lessee, from the land of the plaintiffs. The defendant Stroud was not served with process.

The defendants, Dundas and Stroud, were the owners of a tract of coal land, which they held as tenants in common, adjoining a tract owned by the plaintiffs. One Geiss had started a slope on the defendants' land, which he sold to Dundas and John Bittinger for $500. Bittinger then leased the coal vein from the defendants, at a certain rate for each ton

[1] See *Little Schuylkill Co.* v. *Richards*, 10 M. R. 661.

[2] *McGonigle* v. *Atchison*, 7 Pac. 550; *Alderson* v. *Ennor*, 8 M. R. 526.

of coal mined, and continued the slope, the defendants agreeing to pay $500 toward the expense of putting down the slope, which amount was to be deducted from the rents.

Bittinger sunk the slope 146 feet, and mined upward of 5,000 tons of coal when he ceased working, being then indebted to the defendants in the sum of $261.01 for rent. And by a subsequent survey it was discovered that a large quantity of the coal mined by Bittinger had been taken from the plaintiff's land; and for the value of the coal so taken this action was brought.

On the trial the plaintiffs offered Bittinger as a witness, who was objected to by the defendant as incompetent, being interested, as was alleged, in casting the responsibility of his own acts upon his landlords. The court below overruled the objection, admitted the witness, and the defendant excepted.

The defendant's counsel presented certain points in writing upon which he requested the court to charge the jury, the first and second of which were as follows:

1. In order to recover in this action, the plaintiffs are bound to show a joint liability on the part of the defendants; and that is not shown by proof that they are tenants in common of the coal vein leased to John Bittinger.

2. The defendants are not liable for the unauthorized acts of their tenant; and, if the defendants leased the coal vein to the extent of the boundaries of their own land, the tenant had no right to extend his works into the land of the plaintiffs; and if he did so extend them he only is liable, unless they knew that they were so extended and sanctioned it; and there is no evidence that they knew anything about the extension of Bittinger's works into the land of the plaintiffs.

The court below (HEGINS, P. J.) answered the first point in the affirmative, and in answer to the second instructed the jury that if they believed, from the evidence, that the defendant and Judge Stroud leased the vein of coal to Bittinger, and authorized him to sink a slope upon what they believed to be their own land, and to mine coal from the vein through the slope, and the tenant, under such lease and authority, sunk part of the slope on the land of the plaintiffs, and mined coal therefrom and paid the rent to his landlords, the plaintiffs would be entitled to recover from the defendant in this action the value of the coal taken from the land by the tenant.

To this instruction the defendant excepted; and a verdict and judgment having been rendered for the plaintiffs for $1,098.45, the defendant, Dundas, sued out this writ, and here assigned for error: 1. The admission of Bittinger as a witness. 2. The charge of the court below in answer to the second point presented by the defendant on the trial.

BANNAN, for the plaintiff in error.

F. W. HUGHES and D. B. GREEN, for the defendants in error.

The opinion of the court was delivered by LOWRIE, C. J.

Though Bittinger might have been himself sued for this coal, yet we know of no principle that excludes him from being a witness for the plaintiff, to establish the claim against those who participated in the injurious act; and there are authorities enough in favor of his competence. 1 Harris, 146, 408; 1 Greenl. Ev. § 409.

The charge of the court was in substance that in order to entitle the plaintiff to recover against the defendants it must appear not only that they were landlords of Bittinger, who took out the coal, but also that they participated in the act of going into the plaintiff's land to get it. We think this instruction is quite accurate, and is sustained by most familiar authorities. We think there is evidence that the defendants leased to Bittinger this particular vein of coal, authorized the sinking of the slope by which it was reached, and contributed to its expense, believing that it would not extend beyond their own line, which was not so far out as they supposed; and that by means of this slope, Bittinger took out the coal sued for, and that he has paid for the greater part of it to the defendants as his landlords. Such being the facts found by the jury, the defendants are trespassers with Bittinger: 2 Casey, 489; and the tort being waived, may be sued in *assumpsit* for the value of the coal taken. This view of the case makes all other points raised immaterial.

Judgment affirmed.

ENSMINGER ET AL. v. MCINTIRE ET AL.

(23 California, 593. Supreme Court, 1863.)

Conflicting appropriation of ranchman and miner. One who claims public lands in this State for raising fruit trees or crops, can not enjoin miners from digging up the same for mining purposes, unless he can show that his fruit trees were planted or crops sown before the land was located for mining.

Nonsuit—When may be granted. When the plaintiff closes his evidence, if the court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted.

Appeal from the District Court, Eleventh Judicial District, El Dorado County.

The facts are stated in the opinion of the court.

HEREFORD & WILLIAMS, for appellants.

S. W. SANDERSON, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action of trespass, with a prayer for an injunction to restrain the defendants, who are miners, from digging up ground in the possession of the plaintiffs. After the plaintiffs had introduced all their evidence, the defendants moved for a nonsuit, which was granted, and a judgment was rendered accordingly, from which the plaintiffs appeal.

The evidence showed that the plaintiffs had had an inclosure near the place in controversy, raising grain therein for several years, and the fence had been moved out about one hundred feet toward the ravine where the mining was going on, and the ground in controversy thus included within the inclosure, some time in 1859. In November, 1860, the plaintiffs planted some peach trees on the land, against the objections of one of the miners, and when the ground was worked by the defendants, they had a volunteer crop of wheat there, good for hay.

The testimony was that five peach trees were destroyed by the mining, worth eighteen dollars per hundred, and thirty pounds of hay, worth one and a half cents per pound, making the damages amount in all to one dollar and thirty-five cents. The court below might well have concluded, from the evidence, that the trees were not planted in good faith, for the purpose of raising an orchard, but rather as a means of stopping the mining. Nor did the plaintiffs show a priority of appropriation of the ground in controversy. There was so little evidence in support of the plaintiffs' claim, that the court might well have held that it would not sustain a verdict in favor of the plaintiffs, in which case a nonsuit is proper. Under these circumstances, we would not be justified in disturbing the judgment rendered in the court below.

The judgment is therefore affirmed.

ROBERTS ET AL. v. ROSE.

(L. R. 1 Ex. 82; 4 H. & C. 103. Exchequer Chamber, 1865.)

[1] **Abatement of nuisance—Right to obstruct watercourse.** The plaintiffs, by parol license from L. and from the defendant, constructed a watercourse, and thereby discharged the water from their own mines across the land of L., and thence across the land of the defendant. The defendant, having revoked his license, upon the plaintiffs' refusal to discontinue using the watercourse, entered upon the land of L. at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. The defendant, by stopping the watercourse on his own land, would have done less damage to the plaintiffs than was actually done, but more damage to L. and possibly some damage to the public. *Held*, that the watercourse was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who, after the revocation of the license, were wrong-doers, was subordinate to the convenience of innocent third persons and of the public.

[2] **Technical trespass resulting in benefit to the complaining party.** When there are two ways of abating a nuisance the least mischievous should be chosen; and the facts were held to justify such least mischievous course, although it had been initiated by trespass upon the land of a third party.

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[1] *Stiles* v. *Laird*, 11 M. R. 21.

[2] *Wolf* v. *St. Louis Co.*, 10 M. R. 653; *McKnight* v. *Ratcliff*, 11 Id. 364.

Appeal by the plaintiffs from the judgment of the Court of Exchequer making absolute a rule to enter a nonsuit, and also from their judgment in the same case discharging a rule to set aside the verdict for the defendant on the third issue.

Declaration. First Count: That the plaintiffs being possessed of a colliery, were, by reason thereof, entitled to the privilege of having the water from time to time pumped out of the said colliery, and flow away therefrom along a certain watercourse. Breach: that the defendant wrongfully obstructed the said watercourse, and thereby caused great damage to the plaintiffs, etc.

Second Count: That the plaintiffs being possessed of a certain colliery, called Bank Colliery, did at their own costs and by the license, and with the consent of the owner and occupier of certain land near the said colliery, make a watercourse in the said land for carrying away the water by them from time to time pumped from the said colliery, and from thence until and at the time of the committing of the grievances hereinafter mentioned, during all which period they were possessed of the said colliery, the plaintiffs, by the license and with the consent of the said owner and occupier of the said land, enjoyed the advantage of having the water so by them pumped, as aforesaid, flow away from the said colliery along the said watercourse; that the license and consent to enjoy the said advantage, and the plaintiffs' possession of the said colliery continued till the commencement of this suit, and still do continue, and the said license, consent and advantage were of great value to the plaintiffs; and that the defendant wrongfully and wilfully obstructed the watercourse, and there by prevented the water from flowing along the same away from the said colliery, by means whereof the plaintiffs sustained damage, etc.

Pleas. First, not guilty; secondly, to the first count, traverse that the plaintiffs were entitled to the privilege therein mentioned. Thirdly, to the second count, traverse of the license therein mentioned. Fourthly, to the same; that the defendant was the occupier, and was lawfully possessed of the said land near to the said colliery in which the said plaintiffs made the said watercourse, as in the said second count mentioned, and the

plaintiffs made the said watercourse in the defendant's said land with the leave and license of the defendant, and with such leave and license used the same until the defendant afterward revoked such leave and license, and gave notice to the plaintiffs of such revocation; and because the plaintiffs continued to use such watercourse, and to send the water down the same after such revocation and notice thereof, against the will of the defendant, the defendant obstructed the same.

Replication, joining issue as to the first three pleas, and new assignment to the fourth, that the plaintiffs sue not for the obstruction on the defendant's said land of a watercourse on the defendant's land, but for an obstruction on other land than that mentioned in the fourth plea, and being the land in the second count mentioned, and not being the land of which the defendant was the occupier and possessed as in the fourth plea mentioned, of a watercourse made on such other land with the license and consent of William Lowe, the occupier of such other land.

Pleas to new assignment. First, not guilty; secondly, that the defendant was possessed of certain land adjoining to the land, in the new assignment called other land, and the said watercourse in and over such other land was so constructed that the water passing in and along the same was wrongfully discharged from the same onto the said adjoining land of the defendant, and without entering on the said other land in the new assignment mentioned and obstructing the watercourse on such land, the defendant could not prevent the water from the watercourse from being discharged therefrom and coming on the land of the defendant in this plea mentioned, wherefore, in order to prevent the water from the watercourse from being so discharged and coming on the land of the defendant, the defendant obstructed on such other land the watercourse made on such other land, as he lawfully might for the cause aforesaid.

Replication to pleas to new assignment. First, joining issue thereon; and secondly, as to the second plea, that the obstruction so made by the defendant at the place where it was made was not necessary for preventing the water from being so discharged from the watercourse and coming on the defendant's

land, as the defendant knew at the time when he made it that the obstruction was an obstruction made much higher up the watercourse than the defendant's land, so as to prevent the water from flowing down a large part of the watercourse on the said other land, where the plaintiffs had such license and consent as in the second count mentioned for the flowing thereof; that the water might have flowed along the said last mentioned part of the watercourse without being discharged from the watercourse and coming on the defendant's land, or injuring the defendant, and might have been by the defendant lawfully obstructed on the said other land lower down the watercourse after it had flowed over the last mentioned part thereof, and nearer to the defendant's land than the place where he did obstruct it, as the defendant at the time when he made the obstruction well knew, and that if the same had been obstructed lower down the watercourse on the said other land and nearer to the defendant's land, as aforesaid, such obstruction would have prevented the water from being discharged from the watercourse and coming on the defendant's land, and would not have caused the damage to the plaintiffs in the second count mentioned; and such obstruction, which the defendant so made, as aforesaid, was an unnecessary and unreasonable mode of preventing the water from being discharged from the watercourse and coming on the defendant's land, and by reason thereof did the plaintiffs unnecessary damage.

Rejoinder, taking issue on the second replication to the second plea to the new assignment, and demurrer thereto. Joinder in demurrer.

The demurrer was argued in Michaelmas term, 1863, when judgment was given for the plaintiffs (3 H. & C. 102); and the issues of fact were tried before Keating, J., at the Staffordshire Spring Assizes, 1864, when the following facts were proved: The plaintiffs being the lessees of a colliery called the Bank Colliery, applied, in 1860, to Sir Horace St. Paul, who was the owner (subject to a mortgage) of lands adjoining, for permission to make a watercourse from their pit shaft across his lands to carry away the water pumped out of their mines. Sir Horace St. Paul, by his agent, gave them a written per-

mission accordingly, and they thereupon made a watercourse from the Bank Colliery to a point whence it emptied itself into an old pit caused by the former workings of a colliery called the Broadwater Colliery. A part of the surface of the last mentioned colliery was in the possession of William Lowe, as yearly tenant to Sir H. St. Paul. The plaintiffs obtained Lowe's license to the making of the watercourse, and it was also used by him for the purposes of brickmaking. Early in 1861, the plaintiffs were required by Sir H. St. Paul's agent, to extend the watercourse over the spoil banks of the old pit in order to join another watercourse which had been used by former lessees of the Broadwater Colliery, and which ran on into a neighboring canal.

Soon afterward, in March, 1861, the defendant obtained from the mortgagees of Sir H. St. Paul a lease of the Broadwater Colliery. The lease was of the coal in or under the land, and leave was given to the defendant to occupy such parts of the lands as might be necessary for the due carrying on of the workings of the coal mines, and also to make use of watercourses over the land. There was a reservation to the lessors of a right to make watercourses for the working of certain mines excepted from the lease, proper compensation being made to the lessee.

The defendant, on entering into possession, assented to the continuance of the plaintiffs' watercourse. The extension indicated by Sir H. St. Paul's agent, was subsequently made, as well as another alteration at the defendant's request. The extended watercourse continued to be used by the plaintiffs, subject to a peppercorn rent to Sir H. St. Paul, and also by the defendant until the obstruction mentioned hereafter. Lowe continued to give his license, so far as his lands were concerned.

In January, 1863, the defendant applied to the plaintiffs for a money payment in consideration of their use of the watercourse, but after some negotiations the plaintiffs refused to pay anything, contending that, as the licensees of Sir H. St. Paul, they were entitled to the benefit of the exception in the defendant's lease. The defendant thereupon gave notice to the plaintiffs that the watercourse, having become injurious to their mining operations in consequence of water escaping

from it into their works, must be discontinued. A similar notice was given on the 26th of February, and on the 28th of February, the plaintiffs not having paid any attention to the notices, the defendant stopped up the watercourse on Lowe's land near to the boundary between that land and the plaintiffs' colliery. The effect of this obstruction was to pin back on the surface of the Bank Colliery all water pumped out of the plaintiffs' mines into the watercourse, and in May, 1863, the water had accumulated to such an extent that it percolated through the soil into the plaintiffs' mines. Considerable damage having thus been done, and the plaintiffs having been forced to incur expense in obtaining another outlet for the water of their mine, this action was brought. There was considerable conflict of evidence as to the reasonableness of the mode in which the obstruction was made, but it was eventually established that if the obstruction, instead of being made at the boundary between Lowe's land and the plaintiffs', had been made at a lower point where Lowe's land met the land of the defendant, the damage to the plaintiffs would have been less, though the damage to Lowe would have been greater, and there might also have been injury done to an adjoining public road.

The learned judge ruled that there was a question for the jury on the second replication to the second plea to the new assignment, viz., whether the obstruction of the watercourse by the defendant was an unnecessary and unreasonable mode of preventing the water from being discharged from the watercourse onto the defendant's land. For the purpose of the issue, he directed the jury to assume that the defendant had a right to go upon Lowe's land in order to stop the water from so coming on the defendant's land in a reasonable way. Upon all the other issues he directed a verdict for the defendant.

With regard to the issue on the third plea to the second count, the learned judge ruled that the defendant was entitled to a verdict, upon the ground that the lease of the Broadwater Colliery to the defendant had revoked the license in the second count mentioned, and that the defendant had, therefore, a right to stop the watercourse. He also directed the jury to take all the circumstances into account, and, upon a review of

these circumstances, to say whether the mode and place in which the obstruction actually was made were or were not unreasonable or unnecessary.

A verdict was found for the plaintiffs, leave being reserved to the defendant to move to set it aside and enter a nonsuit, on the ground that there was no evidence to support the second replication to the second plea to the new assignment.

Leave was also reserved to the plaintiffs to enter a verdict on the third plea to the second count of the declaration.

Rules were obtained by the plaintiffs and the defendant, pursuant to the leave reserved in Easter term, 1864. They were argued together later in the same term (3 H. & C. 173), when the court made absolute the rule obtained by the defendant to enter a nonsuit, and discharged that obtained by the plaintiffs to enter a verdict on the third plea to the second count of the declaration.

The plaintiffs appealed against the judgment of the court below.

MELLISH, Q. C. (H. MATTHEWS with him), for the appellants, the plaintiffs below.

GRAY, Q. C. (MACNAMARA with him), for the respondent, was not called on.

BLACKBURN, J.

We are of opinion that the judgment of the court below should be affirmed. Upon one point, however, which will be presently mentioned, my brother, Montague Smith, has some doubts. We are all agreed that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself as against the wrongdoer so far as his interference is positively necessary. We are also agreed that, in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if, by one of these alternative methods, some wrong would be done to an innocent third party or to the public, then that method can not be justified at all, although an interference with the wrongdoer himself might

be justified. . Therefore, where the alternative method involves such an interference, it must not be adopted, and it may become necessary to abate the nuisance in a manner more onerous to the wrongdoer.

Now, applying these principles to this case, it appears that a license was originally given to the plaintiffs by Lowe, and by the defendant, to use a watercourse over their lands. It was a revocable license, to which the plaintiffs, Lowe and the defendant were all parties, whereby the plaintiffs were permitted to pump out water from their mines and send it down over the lands of Lowe and the defendant. Then, as soon as the defendant revoked the license, it became wrong on the part of the plaintiffs to pour down the water any longer. Lowe had licensed the plaintiffs only so long as the water sent onto his land would flow out of it again. If Lowe had been told of the defendant's revocation, he would have said that the flow of water must be stopped, and the plaintiffs would have had no right to complain of his stopping it, when, at his instance, the very thing must have been done to the plaintiffs that actually has now been done. Could the defendant, then, have lawfully built this dam as now proposed whilst the plaintiffs continued to send water over Lowe's land, thus turning it into a pond? I think not; such a proceeding would have done a wrong to Lowe, an innocent person, and also, perhaps, to the public road. That being so, it follows that if the defendant had stopped the watercourse in the way the plaintiffs say he ought to have done it, he would have done an injury to Lowe; and therefore it seems, looking at the mischief actually done to the wrongdoer, and considering, at the same time, that mischief would have been done to an innocent third party by taking the course suggested, that the way of making the obstruction actually adopted was fair and reasonable.

So far, we are all agreed; but then it is to be observed that the defendant, in obstructing the watercourse at the place he chose, did commit a trespass against Lowe by entering on his land, and stopping the watercourse where he did. Either way, therefore, there was a wrong as regards Lowe; and my brother, Montague Smith, thought that perhaps the relative amount of injury was for the jury, and that for this reason

there was ground of application for a new trial. The majority of the court, however, think, as to this point, which was not put at the trial, that the slightness of the injury done, coupled with the fact that Lowe made no complaint, brings the case within the principle that a nonsuit shall not be disturbed on the ground that there is a scintilla of evidence in favor of a contrary verdict.

MELLOR and LUSH, JJ., concurred.

MONTAGUE SMITH, J.—I agree in the principles which have just been laid down. My only doubt is, whether the question of fact with reference to Lowe's position is not for the jury. Now, I think that if the defendant could have entered on Lowe's land without committing a trespass, or if he could have stopped up the watercourse at the lower point without being subject to an action on the case at the suit of Lowe, then he would have been liable in this action, because he would in such a state of things, having two methods open to him, have been bound to choose the point of obstruction least inconvenient to the plaintiffs. But he could not, in fact, have stopped the watercourse at the lower point without flooding Lowe's land. Then, again, by doing the work as he did, the defendant subjected himself to an action of trespass at the suit of Lowe. There is, therefore, a balance of injury, and that is a question of fact for the jury, upon which I do not think them warranted in the conclusion to which they came. That being so, I express a doubt as to whether we are not, in deciding that there was no evidence on this issue, taking upon ourselves too much of the province of the jury. Otherwise I concur with the rest of the court.

Judgment affirmed.

JOHNSON v. LAMPING.

(34 California, 293; Supreme Court, 1867.)

Garnishment—[1] Working claim pending redemption. Upon execution sale against a mining company defendant bought in its claims. After sale he made an agreement with the company by which the company was to work the claims during the period allowed for redemption, and pay the proceeds, less outlays, to defendant, he, the defendant, standing all expenses, pay or no pay. Under this arrangement he received $7,000. Afterward the judgment was reversed, *pro tanto*, and reduced to a sum less than such sum of $7,000. *Held:* (1) That if the sale was void and the entry of defendant a trespass, the proceeds of a tort were not subject to garnishment. (2) That under the contract no debt for the excess was created to the company, at least until the sale was set aside, if in any event.

[2] **Where a party would be liable in case of loss,** by parity of reasoning, he should be entitled to the gain in case of working to a profit.

Appeal from the District Court, Tenth Judicial District Sierra County.

The defendant had judgment in the court below, and plaintiff appealed.

The other facts are sufficiently stated in the opinion of the court.

CREED HAYMOND, for appellant.

P. VAN CLIEF, for respondent.

By the Court, SANDERSON, J.

This is an action by an attaching creditor against a garnishee. The case comes here upon the judgment roll, and the only question is whether the defendant was indebted to the debtors of the plaintiff at the time the attachment was served upon him, within the meaning of the one hundred and twenty-sixth section of the Practice Act.

The respondent makes certain points as to whether the debtors of the plaintiff are the same as the creditors of the

[1] *Davis* v. *Patrick*, 122 U. S. 138.

[2] *Kinney* v. *Cons. Va. Co.*, 10 M. R. 458.

defendant, which we pass without further notice. We assume, for the purposes of our judgment, that the debtors of the plaintiff are the same as the creditors, if such, of the defendant, and that the latter, if at all, is indebted to them jointly, as they are conceded to be jointly indebted to the plaintiff.

It appears from the findings that the defendant, some time previous to the suit of the plaintiff against the Red Star Mining Company, sued that company and obtained a judgment against it by default. The judgment was made to draw a certain rate of interest without there having been any prayer for such relief in the complaint. It was also made payable in gold coin, although the action was not upon a gold contract, as this court subsequently held. It was also erroneous in certain other respects which need not be mentioned here. The case will be found reported in 27 Cal. 99. On appeal to this court the judgment was modified by striking out the clauses in relation to interest and payment in gold coin, and in certain other respects to which reference has been made. There was no stay of proceedings in the court below, and before the decision of the case by this court the defendant had taken out an execution and caused the mining claims of the Red Star Mining Company to be sold. At the sale the defendant bid the full sum for which his execution called and became the purchaser. He paid the sheriff no money, except his fees on the execution, but gave him a receipt, as is usual in such cases, for a sum equal to the face of the execution, less the fees paid to the sheriff. The Red Star Mining Company had ceased to work their mine prior to its sale. After the sale a contract was made between the defendant and the company, by which the latter agreed to work the mine during the time allowed for redemption and pay over the proceeds to the defendant, and the latter agreed to pay all the expenses of working and to pay the company wages in any event, whether the mine should yield a profit or not. Under this contract the defendant received from the mine, over and above expenses, the sum of seven thousand dollars in gold dust.

In view of these facts the appellant claims: First, that the sale was made null and void by the modification of the judgment, and the defendant indebted to the company for the full amount of gold dust taken out of the mine without any deduction on account of his judgment against the company.

because he has not pleaded it as a set-off in this action; and second, that if the sale is valid the defendant is indebted to the company in a sum equal to the excess of his bid at the sale over the face of his judgment, as it now stands.

Assuming, for the sake of the argument, that the modification of the judgment (which was a reduction of the amount) was equivalent to a reversal, and that by reason thereof the sale became null and void, and leaving out of consideration the contract between the defendant and the company under which the mine was worked, we can not agree with counsel for the appellant that the claim of the company against the defendant became a debt in the sense of the statute in relation to attachments: Pr. Act, Sec. 126. The act of the defendant in working the mine, under the view now taken, was a trespass, and he became liable to the company in damages. He became a tort-feasor and not a debtor; and concede that the company, as claimed by the appellant, could have waived the tort and elected to treat him as their debtor, it does not appear that they had ever at any time done so. The company had a legal right to hold him responsible as a tort-feasor —that right they alone could waive, and they could not be deprived of it by their creditors. Until the company has elected to treat him as their debtor, the creditors of the company have no right to do so: Drake on Attachment, Sec. 545; *Lewis* v. *Dubose*, 29 Ala. 219.

But under this aspect of the case, we are further of the opinion that the gold dust became, in any event, the property of the defendant through the legal effect of the contract between him and the company under which the mine was worked. Admit that the company entered into the contract under a mistake, it was a mistake of law; besides, there is nothing to show that the contract would not have been perfectly fair regardless of the sale. From aught that appears, whether the mine would pay for working was a problem yet to be solved. It appears that the company had quit working some time before the sale; why they did so, however, does not appear. Under these circumstances the contract was made, the company agreeing to work the mine for six months and give the gold taken out, be the same more or less, to the defendant, he agreeing to pay the company for their work, and all the other expenses of working the mine in either event,

whether the mine should yield a profit or not. We see no reason why the contract was not valid and binding on the company. If so, the gold taken from the mine under it became the property of the defendant. Had the mine failed to pay expenses the loss would certainly have been his, and by parity of reason the gain should be his. So taking the contract into the account, the defendant not only did not become the debtor of the company, but he did not become a tort-feasor, and there was no cause of action whatever in favor of the company against him, for the contract was a license to enter and work the mine for his own benefit.

Was the defendant indebted to the company in the sum in which his bid exceeded his judgment after it was reduced by this court?

The true condition of the sale—as valid or invalid—we consider to be this: The sale was valid at the time it was made; but, the plaintiff in the execution having become the purchaser, it was liable to be set aside upon a reversal or modification of the judgment by this court (Pr. Act, Sec. 345), or by the court below upon the return of the case (*Reynolds* v. *Harris*, 14 Cal. 677–8), upon the motion of the company. This had not been done at the time the plaintiff's attachment was served upon the defendant, nor, so far as the case shows, has it been done yet. It seems that the company can proceed in the matter by motion in the action in which the sale was made, or by action: *Reynolds* v. *Harris*. It is there suggested that such a motion is unaffected by the Statute of Limitations. (We do not desire, by this reference to the case, to be understood as committing ourselves to that proposition.) This right to have the sale set aside is at the election of the company, and not the creditors of the company, except as hereafter qualified. Until the company elects to treat the sale as valid, there can be no pretense that the defendant is their debtor. Whether he would be, if they were to so elect, it is unnecessary to say. We merely hold that the case presented fails to make the defendant a debtor of the company, within reach of the plaintiff's attachment at the time it was served. In a case like the present, if there should be collusion between the parties, or other legal grounds, the creditors might come in by action, perhaps, but there is clearly no case for an attachment.

Judgment affirmed.

DOUTY ET AL. v. BIRD ET AL.

(60 Pennsylvania State, 48. Supreme Court, 1869.)

Trespass maintained by partner, not owner. Two persons entered into partnership for mining, the lease being to one, to whom all the stock, fixtures, capital and property belonged exclusively, both being in possession. A joint action of trespass by both for injury to the mines is maintainable.

[1]**Profits and expense of maintaining the plant, as damages.** In trespass for breaking a dam, by which the workmen were driven from the mines by the water, evidence of the amount each miner would produce and of the expense of keeping mules whilst the mines could not be worked, is admissible on the question of damages.

Malice—Measure of damages. Where there is evidence that the trespass is malicious, a court should not be too stringent in excluding evidence as to damage, but should wait and instruct the jury as to the true rule, to be given on the whole evidence.

Error to the Court of Common Pleas of Northumberland County.

This was an action of trespass *q. c. f.* brought by John B. Douty and William H. Douty against Joseph Bird and others for breaking down a dam of the plaintiffs and doing other injury to their coal mines.

The writ was issued to January term, 1865.

The plaintiffs declared in their first count that the defendants had taken and carried away trees and coal and that "a certain earthen dam there lately being and deposited, they did cut down, mine, dig and carry away," etc.; in the second, that the defendants took and carried away trees and coal "and one earthen dam there being and erected did pull down, cut, take and carry away, and also the plaintiffs' watercourses, gangways, breastworks, mines, pit-holes, air-shafts and fixtures then and there being erected and constructed, did break, stop up, pull down and destroy." The defendants pleaded "*non cul.*" and "*liberum tenementum.*"

The material trespass alleged against the defendants arose under these circumstances: The plaintiffs were occupying a tract of coal land, as lessees, under a lease from Thomas

[1] *McKnight* v. *Ratcliff*, 11 M. R. 364.

Baumgardner; Bird, one of the defendants, occupied an adjoining coal tract under the Big Mountain Improvement Company, which was on a higher level than the plaintiffs'. The parties in their mining having approached each other within fourteen feet, the defendants broke through the breast of the plaintiffs and let in the water upon their works. The plaintiffs erected dams to stop the water thus let in upon them, which were also broken by the defendants, and the water again let in on the plaintiffs, injuring their railroads, destroying the iron, and throwing their hands and stock out of employ, imposing upon the plaintiffs the expense of wages to their hands and of keeping their stock, as well as general injury.

The plaintiffs gave in evidence a lease for eight years, of the premises, consisting of coal veins, etc., dated February 10, 1859, from Thomas Baumgardner to John B. Douty and William H. Douty, under which the lessees were to work the mines in a proper manner to their full capacity, and pay the lessor at a certain rate per ton of the coal mined and sent away, and to keep the breaker and all the machinery in good working order at their own expense. J. B. Douty, by writing indorsed on the lease, transferred to his co-lessee, W. H. Douty, all his interest in the lease.

On the 31st of March, 1860, W. H. Douty and J. B. Douty entered into an agreement in writing, of which the material parts are as follows, viz.:

"Whereas, the said William H. Douty is in possession of, and is now mining, vending and selling coal at the Henry Clay Colliery, * * * under an agreement of lease from Thomas Baumgardner, dated the 1st day of July, 1859, which said lease is to continue for the term and period of eight years from the date thereof, and the said William H. Douty is sufficiently provided with money, stock, tools, effects, etc., necessary for conducting the business and trade of mining, vending and selling coal at the mines and colliery aforesaid, and the said John B. Douty being an expert, possessed of knowledge, skill and ability of, in and about the said business, etc. In consideration of the said knowledge, skill and ability of the said John B. Douty, etc., * * * the said William H. Douty by these presents does agree, to and with the said John B. Douty, to associate him as a co-partner

in said business of mining, vending and selling coal at the colliery aforesaid. The said John B. Douty being wholly without money, goods, wares, implements, or the other commodities, to invest and deliver in as stock, to be used, etc., in the said business of mining, etc. * * * Therefore, it is hereby agreed by and between the said parties and the said co-partners, etc., * * * in manner and form following, that is to say: The said business of mining, vending and selling coal at the colliery aforesaid shall hereafter, during the continuance of this agreement of co-partnership between them, * * * be conducted under the firm name of William H. Douty & Co. The property, and right of property, and possession in the said lease, and in the stock, horses, mules, cars, drift-cars, tools, implements, fixtures, wares, commodities and things at, about, belonging and necessary to, and employed at said Henry Clay Colliery (except for the necessary purposes of conducting, prosecuting and carrying on the said business of mining, vending and selling coal), to be and remain as fully, absolutely and exclusively the property and chattels of the said William H. Douty as the same were at and before the making of this agreement of co-partnership, the same stock and chattels aforesaid, nor any part thereof, in no wise to become the property of the said John B. Douty during the continuance of this agreement, nor at the termination thereof, but when this agreement of co-partnership shall cease and determine, then the same property, chattels, stock, etc., is to be as exclusively the property of the said William H. Douty as the same now is.

"The said William H. Douty covenants and agrees to pay to him, the said John B. Douty, in consideration of his knowledge, skill and ability in and about the business aforesaid, the sum of sixty dollars per month, for every month during the continuance of this co-partnership. And after all the rents, hire, costs, expenses and charges of every kind whatsoever are fully paid, all such gain, profit and increase as shall arise by reason of said joint business of mining, vending and selling coal as aforesaid, shall, on an account taken for that purpose, at the termination of each current year, be equally and proportionably divided between the said co-partners, share and share alike." * * *

Richard Douty, for the plaintiffs, testified that in February and March, 1863, both the plaintiffs were in possession of the premises leased from Baumgardner; they had coal mines opened and were working them. He testified also as to the breaking through of the breast and the dams, and as to the character of the injury sustained by plaintiffs.

The plaintiffs then proposed to ask the witness what amount of coal each had mined at their colliery per day, at or about the time of the trespass, and what quantity of coal each miner employed by them could have mined on the several days that plaintiffs were obliged to quit work and stop their operations of mining, and what amount of profits the plaintiffs could have realized on each ton of coal that their said hands could have mined during the time they were delayed. This was offered to prove the amount of damage sustained by the plaintiffs.

The defendants objected to the offer; it was rejected by the court, and a bill of exceptions was sealed.

There were other decisions and exceptions as to evidence, which are not material.

After the evidence had closed, the court (JORDAN, P. J.) instructed the jury that the plaintiffs were not entitled to recover. The verdict was, therefore, for the defendants. The plaintiffs took a writ of error, and assigned for error, amongst others, the instruction of the court to the jury and the rejection of the evidence contained in the plaintiffs' first bill of exceptions.

W. M. ROCKAFELLER (with whom were HILL & WOLVERTON), for plaintiffs in error.

J. B. PACKER (with whom was W. J. GREENOUGH), for defendants.

The opinion of the court was delivered by AGNEW, J.

There was no pretense that the trespass of the defendants was committed under any color of title. The objection to the plaintiffs' recovery was founded wholly on a supposed want of joint possession. In this we think there was error. In the first place, there was the positive testimony of Richard Douty

that John B. and William H. Douty were in possession of the land leased of Baumgardner during the time of the alleged trespasses; that they had coal mines opened and were working them; that both carried on the colliery business there. This proof of possession, corroborated by other witnesses, is not rebutted by the agreement of March 31, 1860, between John B. and William H. Douty. The agreement created an express partnership in the business of mining and selling coal at the colliery. It is true the agreement provided that the right of property and possession of the lease and of the stock and personal property should remain absolutely and exclusively the property and chattels of William H. Douty; but this was made subject to an express exception for the necessary purposes of conducting and carrying on of the business of mining and vending coal. The exception carried with it a limited possession, to wit, to the extent necessary to conduct and carry on the mining business. The title to the lease and personal property, and the legal possession of everything not necessary to actual mining operations, remained in William H. Douty; but the joint possession was in both in all that was required to effectuate the purpose of the partnership in carrying on mining operations. A trespass which interrupted or destroyed these operations was clearly an injury to both, and gave them a joint right of action for redress; and to this extent the exception in the agreement let John B. into joint possession with William H. Douty. The injury alleged was one that directly affected the working of the mines, and consequently the joint occupancy of the partners. To enter upon the land they were working, break holes into their mines and inundate them with water from above, was an act of trespass clearly directed against their mining operations. So far, therefore, as the acts complained of affected this joint business thus carried on upon the premises, the plaintiffs were entitled to recover, and the court erred in withdrawing the cause wholly from the jury.

Perhaps the offer contained in the first bill of exceptions was unnecessarily broad, and comprehended more than the plaintiffs might be permitted to recover as damages, but we think the court ought not to have excluded it altogether. So far as the hands were driven from their work by the overflow of

the water from above, it was an interruption caused immediately by the trespass, and to this extent there was a loss of mining operations, which could be proved. Merely speculative profits would not be allowed, but direct losses stand on a different footing. If a miner be driven from his work, the amount of coal produced by his day's labor is easily computed, and the loss on this suffered by his employer is not speculative, but real, and is just the difference between the cost of his labor and the actual price of the coal on that day at the mine. This is the case of a willful tort, and not a contract. The defendants are presumed to know that to let down water on a lower mine, and to drown it out, or partially suspend its operations, would be the immediate effect of their act. Mining operations embrace the labor of mules, as well as of men; so far as this labor is used in actual mining operations, the expense of the mules while actually idle from the influx of water is a loss, which is the legitimate source of reparation in damages. These remarks refer only to a loss immediately connected with the subject of injury, falling within the direct line of consequences and not to any general or supposed loss collateral to or outside of this line. There was evidence from which the jury might have concluded that the trespasses were malicious as well as willful. In such a case a court should not be too stringent in holding the rules excluding the evidence as to damage, but should rather wait and instruct the jury as to the true rule to be given upon the whole evidence. At the stage of the cause when these offers of evidence were made, it would have been proper to hear the evidence as to what hands were interrupted partially or wholly by the influx of water, how much time they lost, how much mining the plaintiffs were thereby deprived of, and all those facts which would throw light on the actual amount of injury they sustained by the trespass which had been proved. In this we do not include speculative profits, such as were condemned in *McKnight* v. *Ratcliff*, 8 Wright, 156. In that case the jury were told that if the mines were rendered entirely useless, the profit that might have been made on the coal would be a fair basis for estimating the damages. This was held to be entirely too vague and difficult of computation, and that the instructions should have been for the actual damage by the

delay, loss of time, injury to machinery and the like; in other words, the actual loss, as we have stated it, arising from the interruption to the mining operations, caused by the trespass referred to. The other errors need no notice.

Judgment reversed and a *venire facias de novo* awarded.

THE YAHOOLA RIVER AND CANE CREEK HYDRAULIC HOSE MINING CO. v. IRBY.

(40 Georgia, 479. Supreme Court, 1869.)

Recitals in deed not binding upon strangers. A recital in a deed that the parties making it are the heirs at law of the former owner, binds only the parties making the deed and persons claiming under it, but is no evidence against strangers.

Trespass by person in possession or by owner. A person in actual possession of land may bring trespass for cutting timber thereon without showing title; and by statute the true owner though not in possession may maintain trespass.

Administrator's deed. In showing title by an administrator's deed, the power to sell must be proved.

Corporations liable in trespass. A mining corporation carrying on the business of mining, is liable for its torts.

[1] **Measure of damages for timber cut under claim of title.** In an action of trespass for cutting timber on vacant land against a mining corporation where it is proved that the defendant's agent in good faith believed it was the company's land, the verdict ought not to be for a sum greater than will "cover the injury shown, by the proof, to have been inflicted."

Trespass *quare clausum fregit*. Damages. Before Judge KNIGHT, Lumpkin Superior Court. September term, 1869.

Irby brought trespass *quare clausum fregit* against the Yahoola River and Cane Creek Hydraulic Hose Mining Company, averring that it had with force and arms broken and entered land lot 345, in said county, and cut and carried therefrom three hundred trees of the value of $500. The defendant pleaded the general issue and Statute of Limitation.

Plaintiff's attorney, to show title in the plaintiff, read in evidence a grant of said lot from the State to Archibald Wal-

[1] *Stockbridge Co.* v. *Cone Iron Works*, 6 M. R. 317; *Ege* v. *Kille*, 10 M. R. 212.

raven, a deed from William Walraven and Peter J. Walraven to Andrew J. Walraven, in which said feoffers were described as the sole heirs at law of Archibald Walraven, and then a deed from Wesley Hudson, as administrator of Andrew J. Walraven, to Irby, in which it was recited that Hudson, as such administrator, had obtained an order of the Court of Ordinary for the sale of said land, had advertised it according to law, and then, at public outcry, knocked it off to Irby, who was the highest bidder, giving time, place and circumstances, as is usual in deeds by administrators. These deeds were read in evidence, notwithstanding the objections of defendant's attorney. He objected to the first because there was no evidence that Archibald Walraven was dead, nor that William and Peter J., were his heirs at law. He objected to the other deed, because it was not shown, otherwise than by the recitals in the deed, that the Court of Ordinary granted leave to sell the land.

A witness testified that Dr. Van Dyke, as agent of defendant in 1865 or 1866, cut, perhaps, one hundred trees off said land, and that they were worth $40.

Defendant's counsel read in evidence a deed from Jacob Deek to Van Dyke, made in February, 1866, and Van Dyke testified that he bought said land from Deek, claimed it *bona fide* as his own, and ordered timber cut from it on his own account, and not as agent of the defendant. He estimated the damages at $30 or $40. There was also read in evidence a deed from the sheriff to Deek. And as to the *bona fides* of Van Dyke's purchase, plaintiff offered a witness who testified that he told Van Dyke, before he bought it, that he thought the title which he was buying was bad.

The court charged the jury that though Van Dyke may have been agent of defendant when the trespass was committed, yet if he had *bona fide* bought the land and believed it was his, then the jury should not find more than the actual damages proved.

The jury found for the plaintiff $100 damages.

Defendant's motion for a new trial was denied.

GEORGE D. RICE, for plaintiff in error.

No appearance for defendant in error.

McCAY, J.

1. We see no reason why the recital in a deed by John and Jacob Doe, that they are the heirs at law of William Doe, should be any evidence of that fact. Any other two men might make a deed with the same recitals in it, and there would be no reason why the recital in one of the deeds should be taken for true rather than in the other. To make out a title to land, all that would be necessary, if this were the law, would be to write a deed to it, setting forth that the maker of the deed was the heir at law of the true owner. Such recitals bind the parties to a deed, and all persons claiming under the deed, but they are no evidence at all against strangers: 4 Peters, 83; 1 Greenleaf Evid., § 23.

2. Our Code, section 2,965, allows an action of trespass by the true owner, even though he was not in possession of the land at the time, provided the land be vacant. At common law the plaintiff must have been in possession. Hence the fiction of the action of ejectment, in which to make out the case it is necessary that the tenant in possession shall confess lease, entry and ouster in John Doe. If the plaintiff be in actual possession, he may maintain the action of trespass without showing title: Rev. Code, Sec. 2,964. But it is only under our statute that the true owner can bring trespass, if he was not in possession at the time. To bring himself within the statute he must show he is the true owner. This he can only do by showing title.

3. The power to sell must always be proven: 4 Ga. 148, 156; 24 Ga. 494. If that power be shown, the fact that the prescribed forms were pursued, will be presumed from the recitals until the contrary appears: Rev. Code, Section 2,520.

4. A corporation may be guilty of a trespass other than a trespass on the case as well as an individual. Its servants, obeying its orders, may render it liable to such an action. It may be that Dr. Van Dyke, in directing the trees cut, was acting as the claimant of the land, but it is also true that the hands, and the person who superintended and directed them, were acting as agents of the corporation, and it makes but little difference whether the trespass was committed by the agent, Dr. Van Dyke, or by the other agents, the actual cutters of the trees.

5. The jury, in their damages, are confined to the proof. It appears very plainly here that there was a *bona fide* belief in Dr. Van Dyke that the land belonged to him, and no greater verdict ought to have been given than will cover the injury shown by the proof to have been inflicted.

Judgment reversed.

HUGUNIN V. MCCUNNIFF ET AL.

(2 Colorado, 367. Supreme Court, 1874.)

[1] **Possession essential in plaintiff.** To maintain trespass *quare clausum fregit* the plaintiff must have actual or constructive possession of the *locus in quo* at the date of the alleged trespasses.

[2] **Vendor retaining other works on same vein.** Defendant Hugunin with others conveyed to Cushman the Elkhorn lode and gave possession under such conveyance of certain workings, retaining possession of a drift and other works under another claim. Afterward developments proved that where Hugunin had worked was on the Elkhorn vein, which he had sold, but Hugunin had not taken out ore except from the same works of which he had retained possession. *Held*, that plaintiffs, as vendees of Cushman, had no actual possession under which they could recover, and that they could not recover on the constructive possession arising out of their deed against the actual possession of defendants.

[3] **Possession of a mine by a drift** is possession to all depths and of all levels from the surface to the center of the earth.

Constructive possession always yields to a possession in fact incompatible with the implication of law which creates it.

Title outstanding in a trustee will prevent a recovery by the beneficiaries.

Conveyance executed after action brought will not strengthen the title of plaintiff in trespass.

Appeal from District Court, Clear Creek County.

The action was trespass, commenced August 30, 1872, by Thomas McCunniff and Eli S. Streeter, against James R. Hugunin, James Lees and David Lees. In the first count the plaintiffs declared for ore taken from the Elkhorn lode. In the second count, for ore taken from the Zillah lode. In the third count, for ore taken from the Zephyr lode. The fourth count was *de bonis asportatis*. The defendants pleaded not

[1] *Bracken* v. *Preston*, 7 M. R. 267; *West* v. *Lanier*, 12 M R. 184.

[2] *Ecker* v. *Moore*, 12 M. R. 686.

[3] *Chamberlain* v. *Collinson*, 9 M. R. 36.

guilty and *liberum tenementum.* The evidence was very voluminous, and it will only be necessary to mention several points which were clearly established. But one lode was in controversy, and that had been cut as early as December, 1871, by the defendant Hugunin, in a tunnel opened by him and called the Eagle Bird tunnel. This tunnel had been opened for a considerable distance beyond the line of the lode, and there was some evidence that the tunnel followed the lode, together with what was known and called the Eagle Bird lode, for a distance of 25 or 30 feet, in a westerly direction. East of the tunnel, a level had been opened for a short distance upon the line of the lode in controversy, and in this level, the defendant Hugunin sunk a shaft, called by him the Casket shaft. At a considerable distance east on the same lode was what was called the Elkhorn shaft, and from that a level opened westerly upon the vein for a short distance. A controversy existed respecting the title to the property between the plaintiffs and the defendant Hugunin and others, and William H. Cushman, acting for and on behalf of the plaintiffs in this suit, but apparently without communicating to those with whom he was dealing the fact that he was acting otherwise than for himself, purchased the property and paid therefor, or agreed to pay, $75,000.

The contract of purchase was evidenced by an agreement dated March 5, 1872, and several of the parties thereto who were not parties to this suit, but who had, apparently, authority from Hugunin, delivered the shaft and level last mentioned to the plaintiffs in this suit, who were acting as the agents of Cushman in that matter. On the 16th day of March, 1872, the defendant Hugunin, and the others who claimed title to the lode, conveyed the same to Cushman. The title was taken by Cushman in his own name, apparently, to secure him for certain moneys which he had advanced toward the purchase of the property. On the 1st of May following, Cushman executed to plaintiffs a bond whereby he covenanted to convey the same property to them upon the payment of certain moneys due him in the time and manner therein specified. Pursuant to this bond, on the 16th of May, 1873, which was long after this suit was begun, he executed a deed to the plaintiffs for the same property. After the purchase by

Cushman, in March, 1872, the plaintiffs opened the level westward from the Elkhorn shaft on the line of the vein, and about the 24th of August, 1872, came into the Casket shaft and level, which, as before stated, had been opened by defendant Hugunin and others to the eastward from the Eagle Bird tunnel, and thus it was demonstrated that those openings were upon one and the same vein. After the purchase by Cushman and prior to the commencement of the suit, the defendants stoped out the vein to a considerable height in the Eagle Bird tunnel and in the level eastward from that which the defendants opened before Cushman purchased, and a shaft was sunk in that level, but it did not appear that this opening was extended eastward or westward by the defendants.

Many other points were mooted, but none of them are discussed in the opinion of the court.

The plaintiffs had judgment and the defendant Hugunin appealed.

W. S. & L. C. ROCKWELL, for appellant.

W. R. GORSLINE, WILLARD TELLER and G. B. REED, for appellees.

WELLS, J.

Had this action been in the name of Cushman, it is altogether probable that the appellant would, by his deed of March 19, 1872, be estopped to assert that the premises mentioned therein did not exist to the extent to which he had assumed to convey them; or that his grantee did not, by the delivery of part in the name of all, become invested with exclusive possession of the whole. Other considerations seem, however, to govern the action of the present plaintiffs. By the strict rule which anciently obtained in the English courts, trespass *quare clausum fregit* lay only by one having a possession in fact, of the premises trespassed upon, at the time of the trespasses. It may be inferred, from what is said in *Sullivan* v. *Clements*, 1 Colo. 261, that with us a constructive possession suffices; and this accords with the current of decision in this country. Whether the defendants in error may maintain

the present action depends, therefore, upon whether, at the date of the alleged trespasses, they had possession, either actual or constructive, of the *locus in quo*. The evidence given upon the trial tended to show that the Elkhorn lode was discovered in the Eagle Bird tunnel in December, A. D. 1871, and that, prior to the conveyance executed by Hugunin and his associates to Cushman, the defendant, drifting westward in the Eagle Bird tunnel, had passed the point of junction for a considerable distance, and had also drifted westward, upon the Elkhorn crevice, which Hugunin then designated and claimed as the Casket, for the distance of 35 or 40 feet. Work on this drift was suspended before the conveyance to Cushman and was never resumed, so that from the day of the delivery of possession to Cushman's agent, down to the bringing of this suit, the defendants' workings seem not to have advanced eastward upon the Elkhorn beyond this point; westward of this point, therefore, the defendants always retained actual possession of all their previous workings, both upon the Elkhorn and upon the Eagle Bird, and eastward of this point the defendant never intruded upon the possession of the plaintiff, if plaintiff had possession there. Westward of this limit, too, as we conceive, the defendants' possession extended to all depths and levels from the surface to the center of the earth, so that the stoping done in the drift upon the Elkhorn, and the sinking of what is called the Casket shaft, was within the bounds of their own actual occupancy. The plaintiffs, as Cushman's vendees, had received possession of the discovery shaft upon the Elkhorn lode, and of all the workings proceeding from that shaft. The question is, therefore, whether out of their possession of this part of the lode the law implies possession of the residue, including what remained in possession of the defendants. The vendee of lands, in an executory contract, which is silent in this respect, is not entitled to possession pending performance; and when admitted thereto, he is said to hold as licensee of his vendor: *Burnett* v. *Caldwell*, 9 Wall. 290. Whether his possession may properly be said to be a possession under the contract, so that the writing may be referred to, to determine its limits and bounds, is perhaps not altogether clear. If, as was held in *Kellogg* v. *Kellogg*, 6 Barb. 116, and *Talbot* v. *Chamberlin*, 3 Paige, 219, his possession is

to be regarded as a right entirely distinct from the equity given by the contract, then it would seem he must be regarded as holding only to the extent of his *pedis possessio*. In this view, the plaintiffs were not in possession of the *locus in quo*, and can not maintain the present action. If, on the contrary, we refer their possession to the written contract of May 1, 1872, which was executed after their possession accrued, but in pursuance of a parol agreement previous thereto, its effect was to give to the plaintiffs a constructive possession of all within the limits prescribed in that writing, and without their *pedis possessio*, so far as not in actual possession by another. Constructive possession always yields to a possession in fact incompatible with the implication of law which creates it, and the plaintiffs are no better entitled to their action, under this view of the matter, than under the other; for the defendants, at the inception of the plaintiffs' right, had an actual possession, which, whether adverse to Cushman or in subordination to his title, was inconsistent with the idea of a constructive possession in the plaintiffs; for the defendants, if not holding adversely to Cushman, must be regarded as his tenants at will; and the actual possession of tenant at will excludes the possibility of an implied possession in another tenant at will, or licensee holding under the same proprietor. The right of the plaintiffs to the possession of what was delivered into their possession was not superior to the right of the defendants to the possession of that which they retained. Plaintiffs held as licensees merely, and the defendants in a capacity not inferior to that certainly, and there is as good ground to obliterate the possession of the plaintiffs, as of the defendants. There is as good reason to extend the possession of the defendants, as of the plaintiffs. In neither view, therefore, can the defendants be said to have had a possession, either actual or constructive, of the *locus in quo*, at the date of the alleged trespasses.

Allusion was made in argument to the circumstance that from the beginning of the negotiation, which was consummated by his purchase, Cushman acted on behalf of the plaintiffs, and with the purpose that the title should eventually pass to them. But this does not affect the question; the estate passed to him, and remained to him, at the time when these

trespasses were committed; he was entitled to the exclusive possession, not only as against the defendants and third persons, but as against the plaintiffs themselves, and the trust upon which he purchased can not, in a court of law, be considered.

Neither does the conveyance, which, after the institution of the present action, Cushman executed to the plaintiffs, strengthen their case. The rights of both parties must be determined by their position at the time of the trespasses. Defendants, up to the date of that conveyance, were tenants at will to Cushman, and are accountable to him for the manner of their occupation, and to give the conveyance effect from a prior date will deprive Cushman of a right of action which before the conveyance was exclusively in him and with which he has not by express words parted; or else to create in these plaintiffs a right of action cumulative to that in Cushman, which will be in effect to subject the defendants to a double accountability for the same transaction. If Cushman's conveyance shall, as against his tenant at will, have relation back to the contract of purchase, no controlling reason is perceived why the same effect might not be accorded to it as against Cushman himself, had he committed the acts complained of; this would be to create, by fiction of law, a constructive possession in those who had neither possession in fact nor the right of possession as against one in whom both were invested.

The cases of *McMillan* v. *Hafley*, 2 Car. Law Rep. (N. C.) 89; *Davis* v. *Evans*, 5 Ired. 525; *Presnell* v. *Ramsour*, 8 Id. 507; *Rich* v. *Baker*, 3 Denio, 80, appear to be in point.

What has been said proceeds upon the idea that the defendants are not shown to have invaded the possession of the plaintiffs; if such invasion of their possession shall hereafter be shown, they will be entitled to recover such damages only as may serve to compensate them for that disturbance of their possession. For the injury occasioned to the substance of the estate, by the mining and carrying away of the ores, the defendant's landlord is alone entitled to recover: *Starr* v. *Jackson*, 11 Mass. 519; *Cannon* v. *Hatcher*, 1 Hill (S. C.) 260; *Spencer* v. *Weatherly*, 1 Jones (N. C.) 327; *Bulkley* v. *Dolbeare*, 7 Conn. 233.

Inasmuch as the litigation, if it should proceed further,

will probably be conducted between other parties, we reserve opinion of the other points presented by the record.

The judgment of the District Court is reversed and the cause will be remanded for further proceedings, according to the views here expressed.

Reversed.

RAFFETTO ET AL. v. FIORI ET AL.

(50 California, 363. Supreme Court, 1875.)

[1] **Trespass by plaintiff out of possession.** Trespass can not be maintained where the plaintiff is actually disseized and the defendant in adverse posse sion of the land.

Appeal from the District Court, Eleventh Judicial District, County of El Dorado.

Prior to the 1st of August, 1870, one Benvonito was in the possession of and claiming to own a mining claim on the west half of the northeast quarter of section nineteen, township ten north, range twelve, east, Mount Diablo base and meridian, in the Newtown Mining District, county of El Dorado. At the same time, the plaintiff G. B. Raffetto, and others, were in the possession of and claiming to own a mining claim adjoining and including the remainder of said subdivision. Benvonito absconded, being in debt to the defendants, who sued him and attached the claim, and on said day entered into possession of his claim, asserting a right thereto. They subsequently recovered a judgment against him by default. Soon after the 17th of August, 1870, the plaintiff G. B. Raffetto and the others, his co-tenants, commenced proceedings preliminary to obtaining a patent for their claim from the United States. When they came to make a survey, they included in the same the Benvonito ground. The defendants objected to the last mentioned ground being included in the survey, and there was some negotiation about the plaintiffs obtaining a patent for all

[1] We think the authorities, generally, allow nominal damages for the original disseizin: *West* v. *Lanier*, 12 M. R. 184.

the ground and then deeding to the defendants the Benvonito ground upon receiving back the money they paid for the same in procuring the patent, but no definite conclusion was arrived at. The plaintiff and his co-tenants proceeded with their survey, and on the 28th of March, 1871, obtained a patent for their claim, including the Benvonito ground. The co-tenants of the plaintiff G. B. Raffetto, sold out to the plaintiff John Raffetto. The defendants continued in the possession of the Benvonito ground, working it and claiming title thereto up to the time of the trial of this action. This was an action of trespass *quare clausum fregit*, for working and taking gold from the Benvonito ground, commenced May 12, 1873. For equitable relief, the plaintiffs asked for an injunction. The court below gave the plaintiffs judgment for damages, and granted a perpetual injunction. The defendants appealed.

P. TEARE and GEORGE G. BLANCHARD, for the appellants.

GEORGE E. WILLIAMS, for the respondents.

BY THE COURT.

The plaintiffs were not in possession of the premises in controversy, in May, 1873, when the action was brought. The fifth finding is, that the defendants were then in possession, and had been so in possession ever since August, 1870. The action is not brought to recover the possession of the premises, but is an action of trespass. The plaintiffs had judgment for one dollar, and also perpetually enjoining the defendants from working the premises or removing the gold or earth therefrom. Where the plaintiff is actually disseized of the land, and the defendant is in the adverse possession thereof, an action of this character can not be maintained.

Judgment reversed and cause remanded.

1. A trespass implies damage in at least a nominal sum: *Attwood* v. *Fricot*, 2 M. R. 305; *Empire Co.* v. *Bonanza Co.*, 67 Cal. 406.

2. Measure of damages in trespass for mesne profits: *Huston* v. *Wickersham*, 2 Watts & S. 308.

3. Where damages have been claimed in ejectment and the court fails to pass on them, it is still a bar to a subsequent suit: *Belcher Co.* v. *Deferrari*, 62 Cal. 160; Compare *Gear* v. *Shaw*, 7 M. R. 643.

4. Measure of damages in trespass for mining and carrying away the plaintiff's coal or ore: *Barton Coal Co.* v. *Cox*, 10 M. R. 157; *Ege* v. *Kille* Id. 212; *Waters* v. *Stevenson*, Id. 240; *McLean Coal Co.* v. *Long*, Id. 193; *Maye* v. *Yappen*, Id. 101; *Alta Co.* v. *Benson Co.*, 16 Pac. 565.

5. Action of trespass for the disseizin maintained without possession—but not for subsequent injury to the freehold: *West* v. *Lanier*, 12 M. R. 184; *Bracken* v. *Preston*, 7 M. R. 267.

6. In trespass plaintiff may recover upon proof of possession without proof of title: *Campbell* v. *Rankin*, 12 M. R. 257; *Rogers* v. *Cooney*, 14 M. R. 85; *Fitzgerald* v. *Urton*, 12 M. R. 198.

7. Payment for trespass in taking coal, to lessee who has never entered under his lease, no defense: *Austin* v. *Huntsville Co.*, 9 M. R. 115.

8. Accepting purchase money for property from trespasser waives the trespass: *Gresley* v. *Mousley*, 3 DeG. F. & J. 433.

9. The taking of iron ore held upon the facts to be a trespass going to the destruction of the estate: *Anderson* v. *Harvey*, 7 M. R. 291. As to what cases justify injunctive relief see INJUNCTION.

10. Effect of judgment in trespass, upon the question of title to the land: *Brennan* v. *Gaston*, 7 M. R. 424, 426; *Outram* v. *Morewood*, 5 M. R. 484.

11. A tax collector selling the interest of the firm for the taxes of a single member is liable in trespass: *Meyer* v. *Larkin*, 3 Cal. 403.

12. Trespass and not case, the proper remedy for encroaching on a lead mine: *Harker* v. *Birkbeck*, 3 Burr. 1556; 1 Wm. Blackstone, 482.

13. Circumstances under which the owner of land may be guilty of trespass: *Coleman* v. *Blewett*, 43 Pa. St. 176.

14. Lessees may maintain trespass: *Ganter* v. *Atkinson*, 9 M. R. 13; *Attersoll* v. *Stevens*, 10 M. R. 67; or the lessor: *Stockbridge Co.* v. *Cone Iron Works*, 6 M. R. 317.

15. Sand was taken by trespass in Missouri and carried to Kansas. *Held*, that the tort could be waived and the owner of the land could recover by action in Kansas: *McGonigle* v. *Atchison*, 7 Pac. 550.

16. Defendant bought timber felled by a trespasser. *Held*, that he was liable, though ignorant of the real ownership and without intention to commit trespass: *Hazelton* v. *Week*, 49 Wis. 661; 35 Am. R. 796; 6 N. W. 309.

17. Release of one joint trespasser is release of all: *Ayer* v. *Ashmead*, 31 Conn. 447; 83 Am. Dec. 154.

18. Injuries to a mine, as such, must be specially declared for: *Patchen* v. *Keeley*, 14 Pac. 347.

19. In wilful trespass, no allowance for expenses: *Id. Contra*, where trespass is no advertent: *Coal Creek Co.* v. *Moses*, 15 M. R. —.

MATHER v. THE MINISTERS OF TRINITY CHURCH ET AL.

(3 Sergeant & Rawle, 509. Supreme Court of Pennsylvania, 1817.)

Presumption of grant, in favor of possession. After a possession of ninety years in a thickly settled part of the State, building a church on part of the land and occupying part as a burial ground, a grant of land or at least a pre-emption right from the commonwealth sufficient to recover in ejectment, will be presumed.

[1]**Double possession.** Where two persons are in possession of land each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land.

[2]**Trover will not lie against party in adverse possession.** Trover for stone and gravel dug from land does not lie in favor of one who has the right of possession against one who has the actual adverse possession of the land under claim of title thereto.

Error to the Common Pleas of Montgomery County.

This was an action of trover brought by the defendants in error, plaintiffs below, for the conversion of a quantity of stone and gravel. It appeared in evidence that the plaintiffs and their predecessors had been long in possession of a church and a small parcel of land adjoining it. Part of this land was inclosed and used for a burial ground ever since the year 1727; the remainder was uninclosed. Near the boundary line of the land claimed by the plaintiffs was a stone quarry, out of which the defendant dug and carried away the stone and gravel which were the subject of this suit. The defendant gave evidence of his having taken stone and gravel from the quarry for a considerable time. He denied in the first place that it was within the limits of the land occupied by the plaintiffs; and contended moreover that if it were within these limits, still he had been so long in possession that the plaintiffs could not recover in this action. The defendant

[1]*Ecker* v. *Moore*, 12 M. R. 686.

[2]The title to a parcel of personalty can not be raised and tried in a personal action where the only means of trying it would be to try the right to the land from which it came: *Harlan* v. *Harlan*, 15 Pa. St. 507; *Brewer* v. *Fleming*, 51 Id. 115; *Lehman* v. *Kellerman*, 65 Id. 489; *Anderson* v. *Happler*, 34 Ill. 436; *Page* v. *Fowler*, 28 Cal. 605; *Brown* v. *Caldwell*, 12 M. R. 674; *Green* v. *Ashland Co.*, Id. 692; *Martin* v. *Thompson*, 62 Cal. 618; 43 Am. R. 663.

insisted, also, that the plaintiffs could not maintain the action, because they had not shown that the title was out of the commonwealth. The president of the court charged the jury that, after so long a possession, a grant from the commonwealth might be presumed; that if the defendant had an adverse and exclusive possession for twenty-one years before the commencement of the action, the plaintiffs were barred; but if the jury should think that the possession was not exclusive, but in common, then the law would adjudge it to be in the party who had the best right, and in that case, if the quarry was within the plaintiffs' claim, the possession would be in them, as the defendant had shown no other title than what arose from his possession. The defendant contended, also, that trover was not the proper action, even though the right to the land was in the plaintiffs. The defendant excepted to the charge of the court.

KITTERA, for the plaintiff in error.

WALLACE and BINNEY, *contra.*

TILGHMAN, C. J.

1. I fully agree with the president of the court of common pleas, that the possession proved by plaintiffs was sufficient to recover in an ejectment, and sufficient for a presumption that the commonwealth had either granted the land, or at least a right of pre-emption, to the predecessors of the plaintiffs. And supposing it to be only a right of pre-emption, that is good title against all persons but the commonwealth. The compliance with the terms of pre-emption, is a matter between the commonwealth and the occupier. A third person has nothing to do with it. There is no absolute time prescribed by law, on which to found this kind of presumption. Circumstances may require in different cases a different length of time. The circumstances, in this case, are very strong. The land lies in the midst of a very thick settled county, where it is extremely valuable. The possession has been too notorious to be unknown to the officers of the late proprietaries. No kind of possession can be more notorious

than the building of a church and using it for public worship, and the occupation of an adjoining piece of land for a burial ground. The remainder of the ground being uninclosed, is no objection to the possession of the whole. It is the common usage to leave a piece uninclosed for the free passage of the congregation and the accommodation of horses and carriages. Considering the object, the possession was complete. It was all that the nature of the case required. And the length of time (ninety years) is so great, that it is not to be accounted for, without supposing a grant or the promise of a grant which would establish a right of pre-emption.

2. I agree also, that where two persons are in possession, the law adjudges the rightful possession to be in the one who has the right to the land. Therefore, although this quarry was occasionally used by the defendant, yet, if it was within the plaintiff's lines, the law would adjudge the rightful possession to be in the plaintiff. It was possible, indeed, for the defendants to have had an exclusive possession, and that was a matter very properly submitted to the jury.

3. Although from the evidence in this case, as we have it mentioned in the judge's charge, I can have no doubt of the right of the plaintiffs to recover in an ejectment, yet there is one particular in which it appears to me that the law was laid down inaccurately, and the jury may have been misled by it. I understand the substance of the charge to be, that although the jury should be of opinion that the defendant had the exclusive and adverse possession of the land from which the stones were taken, for any time less than twenty-one years, yet the plaintiff might recover in this action of trover. This is not the proper form of action to try the title of land, nor have I been able to find any case where it has been sustained for that purpose, although there are many cases where it has been brought for the conversion of wood, coal, etc., when the right of the freehold was not claimed by the defendants. The inconvenience of trover to decide the title of land would be great, for, being a transitory action, the trial might be transferred to a distant county, or even to a distant State if the defendant should happen to be found there. Neither do I find any case where trover has been supported when the possession of the land was held adversely to the plaintiff.

There is a case which, although at first it may appear something like an action of trover against an adverse possession, yet it may be plainly distinguished from it. I mean the case of *Player* v. *Roberts*, 1 Wm. Jones, 243 (cited in 1 Vin. Ab. 237, pl. 7). A, the lord of a manor, leased to B all the coal and coal mines open or to be found in the manor. C was a copy-holder of parcel of the manor for term of his life. A entered on the copy-hold during C's life and dug coals, which he converted to his own use. B recovered against him in trover, although neither A nor B could enter into the copy-hold without being trespassers. But it must be remarked that the title and possession of the copy-holder were not adverse to B, because he claimed no right to the coals; so that although B could not have entered to dig those coals, yet, being dug, A did him wrong in converting them to his own use, because A had leased to him all the coals in the manor. There was no contest about the title of the land, but only about the coals. The title was confessed by both A and B to be in C, so that between A and B it was proper to consider the possession of the coals as in B. So in the other cases, where trover has been brought for wood, it will be found on analyzing them, that the title to the land was not in question. There is a dictum in many books, that possession is not necessary for the support of an action of trover. I think it will be found that this broad assertion is not true, if taken in its full extent, and without qualification. On the contrary we find it laid down in 5 Bac., tit. Trover C. (p. 258 and 280 of the folio ed.), that no person can maintain trover, unless he has had a possession of, as well as property in, the chattel for the conversion of which the action is brought. And this principle when explained, appears to be the law. The explanation is that he who has the general property in a personal chattel, need not prove possession, because the law draws the possession to the property. But he who claims only a special property, must prove that he once had actual possession, without which no special property is complete. That the law draws the possession to the property of personal chattels unconnected with land, may be true, and yet it does not follow that the possession is drawn in like manner to the property of that kind of chattel which was part of the soil until sev-

ered from it, when the soil itself at the moment of severance was held adversely by another. I should rather suppose that in such case, he who had possession of the land had possession also of the stones dug from it, and against him, another person who had the right to the possession of the land, could not support trover. He certainly could not support trespass. But he would not be without remedy; for he might first recover the possession by ejectment, and then recover the mesne profits in an action of trespass. Upon the whole, as I find no authority for supporting an action of trover, by him who has the right of possession against him who has the actual and adverse possession, and sets up title to the land, and as it appears to me, that many inconveniences might flow from such an action, I am of opinion that the charge of the court of common pleas is in that respect erroneous, and therefore the judgment should be reversed, and a *venire facias de novo* awarded.

GIBSON, J., was absent.

DUNCAN, J.—This is a question of some novelty, involves important principles, and is not without its difficulties.

The action is trover for the conversion of stones and gravel taken by the defendant below from a lot of land claimed by the plaintiffs. This action is in substance a remedy to recover the value of personal chattels, wrongfully converted by another to his own use. The plaintiff must have a property in the chattel, general or special, and the actual possession or the right to the immediate possession. In the case of personal property, the general property creates a constructive possession which will be sufficient. The common form of declaring shows that the plaintiff must prove either an actual or a virtual possession. He declares that being possessed he lost the goods. The constructive possession of goods follows the property. But this is not so as to lands. Where the possession is vacant, trespass will lie against a wrongdoer; it is the close of him who has the right. It has long been a settled point, that the owner of wild and uncultivated lands is to be deemed in possession so as to maintain trespass; the possession of such property so continues, until an adverse possession is clearly made out. *Jackson* v. *Sellick*, 8 Johns. 262. Where the pos-

session is vacant it nevertheless is the close of him who has the right, and for violating that right, trespass is the proper remedy. *Van Rensselaer* v. *Van Rensselaer*, 9 Johns. 377; 1 Chitty, 176. Legal seizin carries with it the possession, unless there be adverse possession. *Kennebeck* v. *Call*, 1 Mass. 484. In Pennsylvania a regular, authorized survey gives such seizin and possession as that the owner may maintain trespass against an intruder.

As to lands, the party out of possession, if the land be held adversely, can not maintain trespass; the possession follows the ownership, unless there be an adverse possession: *Van Brunt* v. *Schenck*, 11 Johns. 385. The plaintiff must, in trover, not only show property, but must also show that he had at the time the actual possession, or at least a virtual possession; but if he had a right to the possession this is implied by law: 6 Bac. Ab. 682, 706. Possession is deemed requisite. In trover for bricks the question turned on the possession of the brick yard. The judge directed the jury that if no possession of the brick yard had been taken and continued, such as was visible and notorious to the neighborhood, the marking of part of the kiln of bricks and the memorandum for the lease would not amount to such possession as would enable the plaintiff to recover in this action. This instruction was, on a motion for a new trial, declared to be correct: *Allen* v. *Smith*, 10 Mass. Rep. 308. There is a natural distinction between real and personal property as to the right of the owner. General property draws to it, in the case of personal property, the possession sufficient to enable the owner to maintain trespass, though he has never been in possession. But in the case of real property, there is no such constructive possession, and unless the plaintiff had the actual possession at the time when the injury was committed, he can not maintain trespass: 1 Chitty 150, 176. The property of personal chattels draws to it the possession; but not so of lands; and when the *case of Lord Cullen*, (Bull. Ni. Pri. 33), so much relied on for the defendants in error, is considered with attention, it proves this and no more, that a recovery in trover for lead dug out of a mine, was no evidence of the plaintiff being in possession of the mine, and it is so considered by Sergeant Williams 2 Saund. 47a. Certainly a man might have trover for lead

dug out of a mine; he might have a property general or special in the lead, without having the actual possession of the mine out of which it was dug, necessarily. The record of the recovery in trover for the value of the ore did not establish the fact of his possession of the mine. It might be that trover will lie where a stranger has entered into the lands of another in his actual possession, and committed trespass by digging his soil and carrying it away and converting the gravel, so dug up, to recover the value of the gravel. A stranger entered into lands leased for life, and cut down timber trees and barked them, and the lessee before seizure brought trover for the bark and had judgment to recover, though the cutting down and barking were at one time: 20 Vin. 419; Alleyn, 82. In the case of *Udal* v. *Udal*, is cited *per curiam*, a case which depended seven years between *Berry* and *Heard*, reported in Cro. Car. 242; the principle decided is, that trover would lie for cutting down a timber tree, barking it and carrying away the bark. So *Waller* v. *Sands*, Id. 274, for cutting, carrying away, and converting two hundred loads of timber and two hundred loads of wood. The lessor may maintain trover for the bark of trees cut: Com. Dig. *Biens*, H. Trees. So, though the trees are converted into boards, for the principal substance remains: Moore 19, 20. Though they are converted and carried away at the time of cutting or afterward: Alleyn, 82. Here it will be observed that the possession of the trees was not adverse, and that immediately on the severance, the property and possession were both united in the owner of the inheritance.

It may be laid down, with respect to this action, that it is in substance a remedy to recover the value of personal chattels, wrongfully converted by another to his own use; that it does not lie for injuries to land or other real property, even by a severance from the freehold, unless there be also an asportation; that if, after severance from the freehold, as in the case of trees cut down, the property severed be taken away, or if coals dug from a pit be afterward thrown out, this action will lie by the person having the right and being in the possession, against a mere intruder and trespasser. But where one enters into land, claims title, and exercises acts of ownership, such as these acts stated in this declaration, that he is

liable in this form of action, I very much doubt. Trover never can be the mode in which the title to freehold can be determined. They are actions of different natures, *diverso intuito* not differing in form only, but in substance; one local, the other transitory. A verdict in one can not be received in evidence in another, between the same parties, as in *Lord Cullen's case*, already stated. The title to land can never be directly inquired into in a personal action; indirectly, in a case over which the courts have jurisdiction, it may. The principle drawing after it all the incidents, it is indifferent where the land lies, be it in Turkey or China; the right to it coming incidentally before the court in a trial of a personal action, of which its examination is necessary, and therefore may be inquired into: *Clarke* v. *McIntire*, Addison, 235. But here the right came directly before the court, and was the primary object of inquiry. If the action could not be supported in another county than where the cause of action arose, this is decisive, for if trover could be supported, the plaintiff could have brought the personal action anywhere. But in trover, all inquiry into the title of the freehold is precluded. In this the plaintiffs must have made out the title, in order to a recovery; it must be the very first step; without proving the title to the land, they could not recover for the taking and conversion of its separate clods and the stones or gravel dug out of its bowels. *Liberum tenementum* could be no plea in trover, as it is in trespass.

That it will not lie against one in possession, and who has been in possession, for a period short of twenty-one years, for the exercise of any act of ownership, the conversion of the natural or artificial produce of the soil or of the earth itself or of its contents, appears to me a clear and settled principle. If it did, trover would lie during the pendency of an ejectment to try the title and the mesne profits be recovered before the trial of the title in ejectment. The ejectment for the land might be tried in one court, and trover for the product of the soil in another. There might be a recovery in trover, for the productions of the soil, and the right to the soil itself, on the trial of the ejectment, be found in the defendant. I know not any redress, by action, the owner of land has against him in possession, but by ejectment, and after the recovery in ejectment, and

habere facias possessionem executed and possession delivered,—by trespass for the mesne profits. Advert for one moment to the consequences: A man in Philadelphia claims—say if you please is—the real owner of lands in the county of Erie. He finds the tenant in possession in this city; can he sue him in trover for cutting down his trees, digging up and converting his coals? If he could, he might do so if the lands lay in Kentucky. If he could, the title to lands, in Kentucky, not indirectly but directly, could be decided in the courts in this city. Trespass *quare clausum fregit* will not lie for the owner out of possession; it will not lie in a foreign country. Trover will not lie for taking away the soil, stones and gravel of the owner of the soil, against him who has an adverse possession. It will not lie in a foreign county for the exercise of such acts of ownership, because the courts there can not try or decide the title.

If it would not lie in a foreign county on account of the nature of the inquiry being local, it would not lie in the proper county, because if it could be maintained, being a personal action, it would lie anywhere, and it can not depend on the plaintiff, at his election, to make it local or transitory.

Without giving any opinion on the general question, how far legal seizin of a part is to be considered as the possession of the whole to prevent the operation of the Statute of Limitations it is certain that if it be not, the adverse possession must, be certain, definite, notorious, continued by actual inclosure. Where the possessor does not enter on any claim of right, but is a trespasser and intruder, such possession by intrusion ought not to go beyond the actual occupation and *possessio pedis*. A wrongdoer can have no constructive possession. The opinion of the court below, had this been ejectment, would appear to me correct, both as to the doctrine of possession, boundaries and rights, and was left as fairly on the question of possession as the defendant's case would admit of. Indeed, I would go one step further in favor of the plaintiffs, for I would consider the possession of a lot of ground of this extent, whose boundaries were ascertained by surrounding surveys, and where the possession by the members of this religious society had been in the only way in which it could be occupied for their accommodation, house of worship, burial ground, open ground for the

assemblage of the hearers, and a walk, during the interval of worship, for horses and carriages, as entitling the society to a pre-emption right under the laws and usages of Pennsylvania; thus considering the land as not vacant, but the right to call for the legal title in the plaintiffs, the equitable title being in the plaintiffs, which is sufficient in Pennsylvania to support an ejectment, and thus dispose of the objection of there being no evidence of the title being out of the State.

A possession was established, by testimony, of ninety years, as a burial ground; a possession beyond which the memory of man runneth not to the contrary, to support which every possible intendment ought to be made. So far as respects the rights of the parties, the charge was, in all respects, proper; but not so as I consider the law with respect to the remedy. "If the defendant was in possession for a period short of twenty-one years this action could not be supported." It is this part of the charge which appears to me to be inaccurate. "The defendant has contended that admitting the quarry to be within the original bounds of the church lot, he has become entitled to it by long possession of that part of the ground in which it was. If he, or those he claims under, have had adverse possession of that part of the land for twenty-one years before the action is brought, he is entitled to it." Thus putting the right to recover in this action on the title of the parties, and not whether the plaintiff was in possession of the quarry when the injury complained of was done. In this, I think, there was error, and for this reason I am of opinion that judgment should be reversed. I consider it the duty of courts to preserve the boundaries of actions; and in this case I consider it would be not only a departure in form, but that it would amount to a substantial alteration of the very nature of this action.

Judgment reversed and a venire facias de novo *awarded.*

BRIGGS IRON CO. v. NORTH ADAMS IRON CO.

(12 Cushing, 114. Supreme Judicial Court of Massachusetts, 1853.)

[1] **Bond to pay for ore taken bars trover.** Ore was taken and carried away from an iron ore bed by a party, under claim of right; B., the owner of the land, took a bond of the parties who dug the ore, conditioned to pay all damages in case the title was decided against them. *Held*, that this was a bar to the action of tort for converting it, as against either the obligors or persons claiming the ore under them.

This was an action to recover the value of iron ore dug from the Sherman ore bed, so called, in Lanesborough, and carried to the defendants' furnace, in Adams, and by them used in making iron. At the trial before Metcalf, J., the plaintiffs, to prove their title to the ore, introduced several deeds of the real estate in which the ore bed was situated, tracing their titles thereto, by mesne conveyances, to a deed of Jared Lane to John Wood and others, made in 1790, and other deeds referred to in said Lane's deed; and the defendants contended that by said deed of Lane neither the plaintiffs' grantors nor the plaintiffs under them took any title to the ore under said land, but the judge ruled otherwise. The amount of ore taken was agreed to be 1,686½ tons, and was dug by Nelson H. Stevens and his servants, under a claim of title to the same from the heirs of Samuel Forbes, and was purchased by the defendants. The defendants offered to prove that the plaintiffs had commenced divers suits of trespass and replevin against the said Stevens and others for the said ore, and it was thereupon agreed by parol between the plaintiffs and said Stevens as follows: "That all suits should be discontinued, except the one brought to test the title, and that neither party should dig any more ore from the bed until a decision was had of the said suit, but that each party might carry away the ore already dug by each;" and thereupon said suits of trespass and replevin were discontinued. No more ore was dug by said Stevens, his servants, or the defendants, and the plaintiffs took from said Stevens a bond, signed by himself, John Adams and J. E. Marshall, the con-

[1] *Gresley* v. *Mousley*, 3 De Gex, F. & J. 433.

dition of which was that, "whereas, certain persons, acting under the direction or authority of said Stevens (one of the obligors) and the heirs of Samuel Forbes, deceased, have entered upon a certain lot of land in said Lanesborough, known as the Sherman ore bed lot, which lot and the ores therein is claimed by the said Briggs Iron Company; and having so entered, have opened pits, dug up the soil, and carried away large quantities of iron ore found in said lot, claiming a title thereto under the said Forbes' heirs or otherwise; and whereas, a suit is now pending in equity in the Supreme Court, by said Forbes' heirs and said Stevens, against said Briggs Iron Company, in which the question of title to said ore bed is considered, now, if it shall be finally determined in said suit that the Briggs Iron Company have a title to all said ores or any part thereof, and said Forbes' heirs or the obligors above named shall pay to said Briggs Iron Company all damage occasioned to said company by said entry, digging and carrying away of said ore, then this obligation to be void; otherwise in full force and virtue." It appeared, also, that the defendants took away said ore, a portion before and a portion after said agreement and bond were entered into, and the plaintiffs are now seeking to enforce said bond by suit in this court; but the judge ruled that the foregoing evidence was inadmissible.

Under the rulings of the presiding judge, the verdict was returned for the plaintiffs, which was to be set aside if the rulings were erroneous.

H. L. DAWES, for the defendants.—The tort was waived by the agreement and bond between the plaintiffs and the obligors in the bond, and the remedy was on that alone. The bond contains a covenant to pay for the ore: *Ensign* v. *Kellogg*, 4 Pick. 1; *Plunkett* v. *Meth. Epis. Society*, 3 Cush. 561; and to pay a reasonable price therefor: Story on Sales, § 221; *Hoadley* v. *McLaine*, 10 Bing. 487. The plaintiffs, therefore, must rely upon the bond: *Smith* v. *Hodson*, 4 T. R. 211; *Peters* v. *Ballistier*, 3 Pick. 495; *Allen* v. *Harris*, 1 Ld. Raym. 122; *Hewes* v. *Parkman*, 20 Pick. 90. The plaintiffs had parted with the right to the possession of the ore; they can not, therefore, maintain trover for it: *Fairbank* v. *Phelps*, 22 Pick. 535; 2 Greenl. Ev., § 640.

J. D. COLT, for the plaintiffs.—The evidence offered of the verbal agreement, the discontinuance of the suits and the giving of the bond was right'y rejected because, 1. It was immaterial. 2. It was offered to prove a matter which should have been set forth in the answer in avoidance of the action: St. 1852, C. 312, § 18; 2 Kent Com., 286; *Broome* v. *Wooton*, Yelv. R. 68.

SHAW, C. J.

This is an action of trover to recover damages for a large quantity of iron ore, the property of the plaintiffs, alleged to have been converted by the defendants to their own use. The ground of the plaintiffs' claim is, that they were owners of and had good title to an ore bed in the town of Lanesborough; that certain persons wrongfully claiming to have title thereto, have dug large quantities of ore; that from these persons having no property in or authority to sell the same, the ore had been carried away and converted by the defendants to their own use. We are to assume for the purposes of this argument, that the plaintiffs had established their title to the ore bed as claimed.

The defendants, amongst other grounds of defense, offered a bond in the penalty of $10,000, given to said Briggs Iron Company, the plaintiffs, by John Adams, James E. Marshall and Nelson H. Stevens, some or all of whom had been concerned in digging said ore under the claim of title adverse to that of the plaintiffs. The condition of the bond recited these adverse claims, the fact that the said Stevens and others, under such claim of title, had dug large quantities of iron ore and that a suit in equity was then pending, in which said title was involved, and by which it was expected to be settled; it then stipulated that in case the said title should be found in favor of the Briggs Iron Company to pay all damage occasioned to said company by said entries, diggings and carrying away of said ores.

This evidence was objected to by the plaintiffs and rejected by the court, and a verdict was returned for the plaintiffs. A new trial is now moved for on a report of these facts by the judge who presided at the trial. On reviewing the subject.

the court are of opinion that this evidence ought to have been admitted, and if the facts which it tended to prove were satisfactorily proved, viz., that the parties had agreed upon a mode of adjusting the amount to be paid for the ore taken out of the bed, whether carried away or not, and for receiving the payment therefor, it would be a bar to this action. The ore mentioned in said bond was the same ore for the conversion of which this action of tort is brought. The title having been determined in favor of the plaintiffs, they had security by compact for the same damages sought to be recovered in this action. A stipulation to pay was equivalent to a promise to pay what it was worth: *Hoadley* v. *McLaine*, 10 Bing. 487.

The court are of opinion, that the recitals and stipulations in the bond thus taken amounted to a waiver of an action of tort, and operated as a license for taking away the ore already raised, and that such license extended, not only to the obligors, but to all persons purchasing from or employed by them. Of course, then, the purchase by the defendants from those thus licensed was not a tortious conversion by them, for which this action will lie.

Verdict set aside; new trial in this court.

NORTHAM v. BOWDEN.[1]

(11 Ex. 70. Court of Exchequer, 1855.)

[1] **Possession of ore good against wrongdoer.** The plaintiff, under the license of the owner of the soil to search for tin ore, had in searching for that mineral made certain excavations in the soil. The defendant carted away some of the soil which the plaintiff had so thrown out,— the plaintiff not having abandoned his right to search the soil thrown out for ore. In an action of trover for the removal of the soil: *Held*, that the plaintiff had, as against the defendant, a mere wrongdoer, a sufficient possessory title to the mass thrown out to enable him to maintain the action.

Trover for sand, stone, gravel and minerals. Pleas, not guilty and not possessed—on which issues were joined.

[1] *Courchaine* v. *Bullion Co.*, 12 M. R. 235.

At the trial before CROWDER, J., at the last Bodmin Assizes, it appeared that the plaintiff had, by the license of one Rodd, the owner of the soil, dug certain pits in Trevague Common for the purpose of searching for tin. The license under which the plaintiff acted was at first by parol, but afterward merged in a license by deed. The defendant, who, it was suggested, acted under the authority of one Archer, had taken away two or three cartloads of the soil which had been thrown out of the pits, which the plaintiff had excavated, for the purpose of making the search for the tin. It appeared that there was some tin in the sand and gravel which the defendant had removed.

On the part of the defendant, it was contended that the plaintiff had not such a possession of the soil which had been thrown out of the pits, and which the defendant had removed, as was sufficient to support an action of trover. The learned judge left the case to the jury, who found a verdict for the plaintiff with 5*s.* damages, but his lordship reserved leave to the defendant to move to set the verdict aside and enter a verdict for him.

MONTAGUE SMITH moved accordingly (April 18th), and contended that the plaintiff had not such a possession of the mass thrown out of the pit as would support the action, for that such portion of the soil as had been thrown up was not severed from the realty; and that the action should have been brought by the owner of the soil, whose title to the realty could not have been disputed.

Cur. adv. vult.

POLLOCK, C. B., now said—We are of opinion that there ought to be no rule in this case. It was an action of trover in respect to some ore mixed with gravel which had been dug out by the plaintiff under a license from the person claiming to be the owner of the soil. The defendant carted away two or three cart loads of this gravel. The real litigant parties were probably the persons who respectively claimed adversely the soil as against each other, although the actual parties on the field of battle were the plaintiff, who was licensed by one of them, and the defendant, who acted at the suggestion, though perhaps not under the direct authority, of the other party. The plaintiff relied merely on his possession, arising

from his having dug the gravel and ore under a license from the owner of the soil, as against the defendant, who was a mere wrongdoer. Now the defendant, although he professed to have acted under the authority of some other person, instead of bringing forward the title of that party, rested his case upon a supposed defect in the plaintiff's title. Upon examining the case as reported to us by my learned brother Crowder, it appears that the plaintiff had dug the gravel, in which there was also a quantity of ore; and one point was, whether there was ore of some value in the mass so carted away. The jury found that there was. Under these circumstances we are of opinion that the possessory right of the plaintiff was sufficiently made out to maintain an action of trover against the defendant, who was a mere wrongdoer.

PARKE, B.—I think, as I observed at the time the motion was made, that the plaintiff was not only entitled to maintain the action in respect of the tin ore which was part of the mass thrown out, but also that he was entitled to succeed in respect of his possessory right in the sand and gravel, which, by permission of the owner of the soil, he was at liberty to examine for the purpose of separating the ore from it. I think he had a right to the entire mass as against a wrongdoer; and the defendant, not having proved his title, must be considered as such. The plaintiff's possessory right, therefore, not only applied to the tin as a part of it, but to the whole mass till he had abandoned it.

PLATT, B.—The plaintiff had reduced into his possession the whole mass of soil which he had thrown out of the pits, and by so doing he acquired a sufficient title to it as against a wrongdoer.

MARTIN, B.—I am of the same opinion. If the plaintiff had a right to the gravel and soil for the purpose of getting any mineral that could be found in it, he had such a possession of the whole as entitled him to maintain an action for its conversion against a wrongdoer.

Rule refused.

JACKSON v. WALTON, Trustee of Abbott.

(28 Vermont, 43. Supreme Court, 1856.)

Reclaiming personal property after annexation. The right of the owner of personal property to reclaim it, if he can identify it, does not exist when the property has been annexed to another person's freehold and become a part of the realty.

Stone quarried by trespasser and attached to realty. The principal defendant quarried, dressed, sold and delivered to the trustee (garnishee) a quantity of granite and laid it down for a permanent walk on the trustee's premises. He obtained the stone without right, from the quarry of a third person, who, after the walk was laid, claimed them as his property: *Held*, that the property in the stone was in the trustee after they were laid into a walk, and that the trustee was indebted to the principal defendant, and liable as his trustee, at least, for the increased value of the stone, which was produced by their being quarried, dressed and delivered.

Title passes to the owner of the realty, where personalty, though got by tort, is annexed to the realty.

Trustee process. The trustee disclosed as follows:

"Some time in the year 1852, I said to Mr. R. F. Abbott, that I wanted some stone for a front walk. He replied, that he could probably procure or furnish them. In the month of August, 1853, Mr. Bradish served a trustee writ upon me as indebted to said Abbott. I had not then received the stone of any one. On the afternoon of the same day, or the forenoon of the next (I am not certain which) Mr. Moses Peck said to me, that he had some granite stone for a walk to deliver me as the property of Mr. Drury, who had employed him to bring them; and that he should deliver them only as the property of Mr. Drury. I said to him he might so deliver them, and he did so. Mr. Abbott laid the stone for me, and received his pay therefor, by an order on E. P. Walton & Son."

Commissioners were appointed, who reported that the trustee was indebted to the principal defendant in the sum of sixty dollars, and chargeable for that sum; subject to the opinion of the court upon the following facts.

The debt of the trustee is for 114 feet of hewed granite

[1] *Reese* v. *Jared*, 15 Ind. 142; 77 Am. Dec. 88; *Wetherbee* v. *Green*, 22 Mich. 311; 7 Am. R. 653.

stone, delivered to him by Abbott, on the 3d day of August, 1853, for a walk from his front door to the street, with curbstones at the sides, which were immediately laid down, and have been ever since, and are now used for that purpose. These stones were taken from a granite quarry owned by Erastus S. Camp, and mostly after March 10, 1853. Some time previous to that time Abbott made an arrangement with Alvan Drury to take a lease of this granite quarry from Camp, Abbott paying or securing the rent, so that Drury was not to pay or be holden for it, in any way, at any time. Abbott then applied to Camp for a lease to Drury, and Camp subsequently executed one in duplicate, but it was never accepted or executed by Drury. The rent, as stipulated in the lease, was $35 per year, but it has never been paid. Drury declined to pay it, and the commissioners found that he was not liable for it, and they did not find that either Drury or Abbott had any right to take stone from the quarry till the rent was provided for in some way, which had never been done. The stones were worth in the quarry one cent per foot. In laying them down for a walk at the trustee's house, the space to be occupied by the walk was first dug out and a foundation of rough stones laid, upon which the flat granite stones, three in number, were placed. The face of the flat stones was upon the same level as the earth surrounding. The curbstones were set in the earth by the side of these flat stones, arising above them four or five inches. For some two feet in width at the side of the curbstones, the soil was raised nearly to the height of the curbstones, which were set in the earth about six or eight inches below the upper surface of the flat stones. The walk was cut and fitted for the place it occupies, but can be removed without doing any damage to the dwelling house of the trustee.

At the time of the service of the writ in this suit, Abbott was indebted to Drury. The stones were attached on the plaintiff's writ in this suit, as the property of Abbott, and were then in the charge of the teamster, Moses Peck. Thereupon Abbott requested said Peck to deliver the stone to the trustee as the property of Drury, which the said Peck then did, as is narrated in the trustee's disclosure, all the facts stated in which the commissioners found to be true. After this, the attachment of the stones was abandoned and the trustee proc-

ess relied upon to secure the debt. Drury knew nothing of Abbott's contract with the trustee, and nothing of these stones until the present suit was commenced.

During the hearing before the commissioners, and near its close, Camp notified the trustee that he claimed said stone as his property. He did this upon learning that Drury denied all liability for the rent of the quarry, Abbott being wholly irresponsible.

Upon the facts so disclosed and reported, the county court, 1855, Poland, J., presiding, adjudged the trustee chargeable for the sum reported. Exceptions by the trustee.

O. H. SMITH, for the trustee.

MERRILL & WILLARD, for the plaintiff.

The opinion of the court was delivered at the circuit session in September, 1856, by BENNETT, J.

This case comes up on exceptions to the decision of the county court rendering the trustee chargeable. It seems the case must turn upon the question, to whom did Mr. Walton owe this debt? If not to Mr. Abbott, he should not be adjudged chargeable. It is found in the case that some time in the year 1852 Mr. Walton spoke to Mr. Abbott for the stone, and that he was answered by Mr. Abbott that he, Abbott, could probably furnish them; and it is expressly found by the commissioners that Abbott did deliver the stone to Mr. Walton on the third day of August, 1853, and that he received them and used them for the purposes for which they were designed. These facts are abundant to show an indebtedness from Walton to Abbott, unless there is enough in the case to control them. It is claimed, however, that this debt belonged to Drury, and not to Abbott. It becomes important to see what the facts are bearing upon this point. It is true, the trustee discloses that one Moses Peck told him he had some stone for a walk to deliver him, as the property of Mr. Drury, who, he said, had employed him to bring them; and that he should only deliver them as the property of Mr. Drury; and the trustee says he told him he might so deliver them, and he

did so. But, still, it is found that Abbott really delivered the stone, and that he in fact requested Peck to deliver the stone to the trustee as the property of Drury, which was done; and that Drury knew nothing of Abbott's contract with the trustee, and nothing about these stones until the present suit was commenced. There is nothing in the case to show that Drury had any interest in the stone, or that Abbott could be regarded in any sense as acting as the agent of Drury; but the case shows the reverse, and that Abbott quarried out these stones for and on his own account.

Upon such a state of facts, no debt can be claimed as being due from the trustee to Drury. Drury was but a man of straw; and though Abbott caused Peck to act ostensibly in his name, yet it was without any authority, and without any interest in Drury; and what was done was in truth done by Abbott, as the commissioners have found. The disclosure of the trustee simply affirms that Peck assumed to act for Drury in the delivery of the stone; and that the trustee consented that the stone should be delivered and received as the property of Drury. This would not necessarily make them so, as matter of fact.

It is further objected by the trustee, that he should not be chargeable as the trustee of Abbott, upon the ground that Abbott quarried these stones from a quarry belonging to one E. S. Camp, without any right, and was a trespasser in so doing; and that, consequently, it is said, the trustee is liable to Camp for the value of the stone, and should not be held liable to the principal debtor. But suppose it be conceded that Abbott trespassed upon the rights of Camp in quarrying the stone, and might have been sued in tort by Camp for the injury done him, does it follow that Camp can sue the trustee in assumpsit, or tort, and recover the value of the stone? These stone were purchased by Mr. Walton for a walk from his front door to the street, and were used for this purpose; and when these stone had been laid down in the manner detailed in the bill of exceptions, they became a part of the trustee's realty, as much so as if they had been stone for a wall, and had been not only purchased for that use, but had been actually laid into stone wall upon his farm. Though it may be true that whatever alteration there may be in the

form of property, if the owner can prove the identity of the original materials, he may still seize it in its new shape; yet this right only exists so long as the identity of the original materials can be established. This principle, however, does not apply to cases where the property, illegally taken, has lost its identity, or has been annexed to the freehold. It then becomes a part of the realty, and its nature is changed: 6 Bacon, Trespass, p. 580. See, also, 7 Cowen, 95; 6 Hill, 425.

Though it might be true, that in an action of trespass against Abbott, the measure of damages might be the value of the stone at the time of the asportation, and in an action of trover the value at the time of the conversion, as evidenced by a demand and refusal, even although the value had been increased by the previous tortious acts on the part of the defendant which might have subjected him to an action, yet it does not necessarily follow, that the same rule of damages would obtain in a suit against Abbott's vendee. It is to be presumed that Walton bought the stone in good faith, and was not guilty of any intentional wrong upon the rights of Camp, and when the trustee had annexed these stones to his freehold, the title to them would not attach in Camp, but they would belong to the trustee, when they became a part of his realty. The right of property was thereby changed, and, however it might be in a suit against Abbott, upon which we have no occasion to express any opinion, we think Walton could not be held liable to Camp for the increased value of the stone produced by their being quarried, wrought and delivered to the trustee by Abbott.

The amount of hewed stone delivered was 114 feet, and the value of these stones in the quarry is found to be one cent per foot. If it was to be conceded that, in an action by Abbott against Walton for the value of the stone, Walton would have the right to retain to the amount of the value of the stone in the quarry, upon the ground of his liability to Camp, yet this can not lead to the reversal of the judgment of the county court. The commissioners decided from the disclosure and facts found by them, that Walton was indebted to Abbott in the sum of sixty dollars, and was his trustee in that sum. It is nowhere found that this sum was the precise value of the stone as delivered; and, for aught which appears from the

commissioners' report, they may have deducted the value of the stone while in the quarry, from what would otherwise be the amount of Walton's indebtedness. It is consistent with the report that they should have done it; and we are not to presume they did not, for the sake of reversing the judgment of the county court. The case of *Martin* v. *Porter*, 5 M. & W. 351, and *Wingate* v. *Smith*, 20 Maine, 287, to which we have been referred by the defendant's counsel, are not cases where a change in the title to the property had been effected.

Judgment of the county court is affirmed against the trustee with costs, and is, *pro forma*, affirmed against the principal debtor without costs.

FORSYTH v. WELLS.

(41 Pennsylvania State, 291; 80 Am. Dec. 617. Supreme Court, 1862.)

Trover lies for coal mined upon and carried away from the land of another by mistake.

[1] **The measure of damages** is the fair value of the coal *in place* and such injury to the land as the mining may have caused.

Error to the Common Pleas of Fayette County.

This was an action on the case brought February 22, 1859, by Deborah Wells against William and Robert Forsyth. The plaintiff declared in trover for mining and carrying away coal from her lands, to which defendants pleaded not guilty. On the trial a *nolle prosequi* was entered as to William Forsyth, and the case tried against Robert alone.

The parties were owners of adjoining tracts of coal land, and the defendant had opened a mine or drift on his land near the line and worked it for several years. The surface being rough and hilly the dividing line was not exactly known; and

[1] This case was overruled on this point in *Lyon* v. *Gormley*, 5 M. R. 383, but not until its reasoning and authority had been widely followed as the better law: *Ege* v. *Kille*. 10 M. R. 220; *Waters* v. *Stevenson*, Id. 257, 261; *Chamberlain* v. *Collinson*, 9 M. R. 41; *Austin* v. *Huntsville Co.*, Id. 124; *Coal Creek Co.* v. *Moses*, 15 Lea, 300; 54 Am. R. 420.

the plaintiff claimed that the defendant had dug coal in his drift over the line and out of her land; which was denied.

It was contended for the defendant that trover was not the proper remedy under the evidence in the case, and that it would not lie; but the court charged the jury that trover would lie, and that the defendant must account for the coal in this form of action.

The plaintiff claimed that the measure of damages was the value of the coal when dug in the bank, or what was called "knocked down;" while it was contended on the part of the defendant that if he was bound to account in this form of action at all, the measure of damages would be the value of the coal in the ground before he had expended any labor in preparing it for market, in support of which he offered evidence of the value of coal leave; but the court rejected the evidence and charged the jury that the measure of damages was the value of the coal when "knocked down" in the bank—the difference in value being about one to eight.

Under these instructions there was a verdict and judgment in favor of plaintiff for $775.92.

Errors were assigned upon other points but the opinion of the court is confined to deciding, in terms, that trover would lie for coals so severed and to the question of the measure of damages.

D. KAINE, for plaintiff in error.—"Title can not be decided in an action merely personal and transitory, no matter whether it be replevin, trover or assumpsit. Nor can these actions be maintained by one not in the actual exclusive possession, whatever his title may be against one who is in the possession claiming right:" *Brown* v. *Caldwell*, 10 S. & R. 118.

Had the coal mine, opening and all, been upon the admitted land of the plaintiff, there might be some doubt under the authority of the case of *Player* v. *Roberts*, referred to in 6 Bac. Ab. 679: "If J. S. dig coals in a pit of J. N. and throw them out of the pit, he is guilty of a conversion." But here the pit was the undisputed property of the defendant, and if he did dig any coal over what may turn out to be the true line, he did it claiming the land as his own and took the coal out of his own pit. The case of *Player* v. *Roberts*, is referred

to in *Mather* v. *The Church*, 3 S. & R. 512, where it is said: "There was no contest about the title of land, but only about the coal." But the very point is decided in *Powell* v. *Smith*, 2 Watts, 127.

Admitting that the coal taken out was under the surface of the land owned by the plaintiff, what did it amount to? It did not exceed half an acre in extent, the coal leave for which, at the usual prices in this locality, would not exceed twenty five dollars, or about fifty dollars per acre. This the defendant offered to prove but the evidence was not admitted by the court. The paramount rule in assessing damages is, that every person unjustly deprived of his rights should at least be fully compensated for the injury he sustained: 2 Casey, 146.

The testimony offered by the defendant in regard to the real value of the coal at the time it was dug, should have been admitted.

For defendant in error it was argued that trover would lie for coal severed from the realty, and that, if so, the proper measure of damages was the value of the coal when brought into that state or condition which made it personalty and the subject of conversion by the defendant. In support of which the following cases were cited and relied on: *Martin* v. *Porter*, 5 M. & W. 351; *Wild* v. *Holt*, 9 Id. 672; *Baker* v. *Wheeler*, 8 Wend. 505; *Wright* v. *Guier*, 9 Watts, 172; *Harlan* v. *Harlan*, 3 Harris, 507; *Farrant* v. *Thompson*, 5 B. & Ald. 826; *Mooers* v. *Wait*, 3 Wend. 104; *Mather* v. *Trinity Church*, 3 S. & R. 509; *Elliott* v. *Powell*, 10 Watts, 453.

The opinion of the court was delivered January 6, 1862, by LOWRIE, C. J.

We are to assume that it was by mistake that the defendant below went beyond his line in mining his coal, and mined and carried away some of the plaintiff's coal, and it is fully settled that for this trover lies: 3 S. & R. 515; 9 Watts, 172; 8 Barr, 294; 9 Id. 343; 9 Casey, 251.

What, then, is the measure of damages? The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it has been mined or severed from the

realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule the principle, and must be adapted to its office.

Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another and converted to his own use. But it is not thus restricted in practice, for it is continually applied to every form of wrongful conversion and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and detention of them: 6 S. & R. 426; 12 Id. 93; 3 Watts, 333. Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus: 1 Jones, 381. And so does trespass: 7 Casey, 456.

In very strict form trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber or quarrying stone or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained without giving up any claim for any outrage or violence in the act of taking: 3 Barr, 13. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for

goods wrongfully appropriated. When there is no fraud or violence or malice, the just value of the property is enough: 11 Casey, 28.

When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary; because the plaintiff with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form it is not in order to enable the plaintiff by his own choice of actions, to increase his recovery beyond just compensation; but only to give him a more convenient form of recovering that much.

Our case raises a question of taking by mere mistake because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of willful wrong, and especially the very learned and thoughtful opinions in the case of *Silsbury* v. *McCoon*, 4 Denio, 332, and 3 Comst. 379, warn us to be careful how we express ourselves on that subject.

We do find cases of trespass, where judges have adopted a mode of calculating damages for taking coal, that is substantially equivalent to the rule laid down by the common pleas in this case, even where no willful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then we can not avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation: 5 M. & W. 351; 9 Id. 672; 3 Q. B. 283; and see 28 Eng. L. & E. 175. We prefer the rule in *Wood* v. *Morewood*, 3 Q. B. 440, n., where Parke, B., decided in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal field had been purchased from the plaintiffs. See also Bainbridge on Mines and Minerals, 510; 17 Pick. 1.

Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence or willful negligence

or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425 and note; 21 Barbour, 92; 23 Conn. 523; 38 Maine, 174.

Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of action so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits: 7 Casey, 456.

Judgment reversed and a new trial awarded.

READ, J., dissented.

CASTOR v. MCSHAFFERY.

(48 Pennsylvania State, 437. Supreme Court, 1865.)

[1] **Trover not maintainable without title.** One who has been hired to take out stone from the quarry for a third person, by a contractor who has contracted with a turnpike company to stone a portion of their road, has no such property in the stones quarried by him, after his employer has abandoned his contract, as will enable him, after leaving possession, to maintain trover therefor against the agent of the company by whose order the stones thus quarried had been absolutely placed upon the road.

Error to the Common Pleas of Philadelphia.

This was an action on the case by Henry McShaffery against

[1] *Watts* v. *Tibbals*, 5 M. R. 662; *McKee* v. *Brooks*, 20 Mo. 526; *Stough* v. *Stefani*, 19 Neb. 468.

Peter Castor, in which the plaintiff declared in trover for a certain quantity of broken stone. The defendant pleaded not guilty, and on the trial, under the ruling of the court below, there was a verdict and judgment for plaintiff.

The whole case, with the errors assigned by plaintiff in error, will be found in the opinion of this court.

B. WOODWARD, for plaintiff in error.

The defendant's counsel presented no printed argument.

PER CURIAM.

James McGucken contracted with the Frankford & Oxford Turnpike Company to quarry stone, and stone a portion of their road. He contracted with Knorr for leave to quarry the stone on his land, and he hired McShaffery to do the work of quarrying. Knorr was to have fifteen cents a perch for the stone leave, to be paid to him by the turnpike company, and McShaffery was to have seventy or seventy-five cents the perch for quarrying and breaking the stone, to be paid to him by McGucken.

Such were the relations between these several parties when McGucken gave up his contract with the turnpike company. After he had abandoned his contract McShaffery continued his work and quarried the stones in question in this suit. McGucken swore that he had ceased quarrying before he abandoned his contract with the company, and that he did not employ McShaffery to quarry the stones in question. He said moreover, that he left McShaffery at the quarry; that McShaffery quarried and broke the stone in question; that he (McGucken) paid McShaffery nothing for the stones, but advised him to sell them, and that he (McGucken) did not own the stone—that the stone in question were never his.

There was no other evidence of McGucken's ownership, yet the court told the jury the stones in question were McGucken's, and he could do what he pleased with them; he could sell them to the plaintiff or any one else. To have submitted the question to the jury upon such evidence would have been error, but it was more manifest error to rule it as a conclusion

of law that the stones were McGucken's property. Q arried on Knorr's land after his contract with the company was at an end, and after his employment of McShaffery had ceased, how was it possible for McGucken to have any property in the stones? Swearing that he had no property in them, on what ground could the learned judge rule that he had? If he had no property in them he could transfer none to McShaffery, and we see not a particle of evidence of any attempt to sell or transfer them to McShaffery. Then how did McShaffery acquire title that would support an action of trover against the agent of the turnpike company? He had not the possession, in virtue of which he might perhaps have claimed a lien for his labor, and, so far as the record shows, he had no title. Without title, possession or lien, McShaffery can not maintain trover. Whether he can recover against McGucken or the company in an action of assumpsit for work and labor need not now be considered. It is enough for the present to say that upon the facts exhibited he was not entitled to recover in an action of trover.

The judgment is reversed.

BOND v. MOUNT HOPE IRON CO.

(99 Massachusetts, 505; 97 Am. Dec. 49. Supreme Judicial Court, 1868.)

[1] **Conversion by company refusing to issue stock.** The refusal of a corporation on demand to transfer stock to an assignee of shares upon invalid grounds entitles such assignee to recover its value against the company.

[2] **Confined to excuses alleged at time of conversion.** When the refusal of a corporation to issue a certificate is placed upon a certain ground or excuse which is not valid they can not be heard to allege other reasons on trial not before urged.

Tort, with a count in *contract*, for the conversion of seventy shares of the capital stock of the defendant corporation.

At the trial in the Superior Court, before VOSE, J., there was evidence tending to show that George W. Bond, a brother

[1] *Budd* v. *Multnomah Ry.*, 12 Or. 271; 53 Am. R. 355; *State* v. *Guerrero*, 9 M. R. 660.

[2] *Briggs* v. *Haycock*, 63 Cal. 343.

of the plaintiff, owned the seventy shares, in two lots, one of twenty shares (for which he held the certificate in his own name), the other of fifty shares, which he had pledged to Albert Field to secure the payment of a note for upward of $6,000 (the certificate of which stood in the name of Field, who was the president of the corporation, as collateral security, and was so expressed on its face); that the plaintiff bought all these shares from George W. Bond, who indorsed upon the back of the certificate of the twenty shares a formal assignment of all his right, title and interest therein to the plaintiff and executed a separate assignment to the plaintiff of all his right, title and interest in the fifty shares, describing them by their numbers, setting forth fully the pledge of them to Field, and reciting that the assignment was made subject to Field's claim. It further appeared that the certificates were expressed to be transferable by George W. Bond and by Field respectively, "on producing this certificate" and to be "subject to such conditions as are imposed by the by-laws of the company," the ninth article of which was as follows: "When any member of this corporation shall be desirous of selling any of his shares he shall first offer the same to the directors of this company at the lowest price at which he will sell said shares; and if the company shall pay to him such price he shall thereupon sell and transfer said shares to the company or to whomsoever they may elect to receive the same; provided, that if the company shall neglect to take and pay for said shares within six days after such offer, then they may be disposed of to any person, and no shares shall be transferred until the requirements of this by-law have been complied with." The other material facts are stated in the opinion.

The plaintiff waived all his claim or right in the seventy shares, and offered to transfer the same to the company. The judge, ruled that the measure of damages was the value of the stock, and directed a verdict for the plaintiff for $10,782-.80, being the amount of such value at the time of the alleged conversion (assessed by an auditor whose finding was not disputed by either party) with interest from that time. The defendants alleged exceptions.

T. WESTON, JR., for the defendants.

W. ALLEN and D. W. BOND, for the plaintiff.

CHAPMAN, C. J.

The plaintiff was possessed of a certificate for twenty shares of the defendant's stock, duly assigned to him by a writing on the back of the same. He had also an assignment of fifty shares, which stood in the name of Albert Field, the president of the corporation, as collateral security for the payment of a note. He paid the note and took it up; and a receipt for the payment was written by Field's clerk in Field's name on the back of the certificate, which, with the note, the clerk delivered to the plaintiff. The treasurer of the corporation was present at the payment, and knew the facts. The plaintiff having the papers with him demanded a transfer and certificates made to him. This was refused by the treasurer, solely on the ground that the ninth by-law of the corporation had not been complied with.

The plaintiff contends, 1, that this by-law is invalid; 2, that it had been complied with some time before, by an offer of the owner to sell the stock to them, and their refusal to purchase it. We think the correspondence between George W. Bond, the owner, and Job M. Leonard, the defendant's treasurer, show that the by-law had been complied with. Therefore the question of its validity has become immaterial.

The defendants now contend that they were not bound to make the transfer, because Mr. Field, their president, was sick at the time of the plaintiff's demand and until after the action was brought, and could not sign a certificate. But their refusal was put on the sole ground that the by-law had not been complied with; and therefore the alleged sickness of the president is immaterial.

They also say that the plaintiff did not leave his certificates with the treasurer when he demanded his stock. But he had them with him, and gave the treasurer copies of his transfers, which was all that he required, and he still refused to make the transfer, on the sole ground that the by-law had not been complied with.

They say further that the plaintiff consented to a delay until the next week. But he did this upon the promise of the

treasurer to send him the certificates at that time. The certificates were not sent, and no reply was made to his subsequent letter asking for a transfer. They can not, therefore, justly contend that his consent to this delay was a waiver of his rights. He has made a proper demand and it has been refused on a ground which was invalid. The stock having been unjustly withheld, he is entitled to recover its value.

Exceptions overruled.

BOYLAN, Respondent, v. HUGUET ET AL., Appellants.

(8 Nevada, 345. Supreme Court, 1873.)

Trover for mining stock against assignees for benefit of creditors. Where a stock-broker failed and assigned his property for the benefit of creditors, but one of them, for whom he had purchased stock in certain companies, declined to accept the assignment and demanded stock in such companies then held by the assignees, and upon their refusal to deliver brought trover as for a conversion: *Held*, that the fact that the assignees did not have sufficient of such stock to fill all the broker's contracts therefor could not be urged as a valid objection to a recovery.

Brokers need not deliver identical stock purchased. In the ordinary transactions between principals and brokers, principals are not entitled to receive the identical shares of stock purchased on their order, and brokers are within their contracts so long as they are prepared to deliver on payment and demand certificates representing the requisite number of shares.

[1] **There is no special value or property in any particular share** of mining stock, as distinguished from any other share, unless issued in the name of a party and charged to him upon the books of the company.

The damages awarded in trover should be only such as necessarily flow from the wrongful act; that is to say, the value of the property at the time of conversion (for that is what one has found and the other lost), together with damages for the detention of that value (which is interest from conversion to judgment), and in addition any special damage which may legitimately arise out of matters in existence at the date of the tort.

[2] **"Highest market price" not true rule of damages.** Where judgment in trover for the conversion of mining stock was for the highest market price between the conversion and the trial, and far exceeded the market price at the time of conversion, no special damage being shown: *Held*, that the judgment proceeded upon a wrong theory of the measure of damages, and should be reversed.

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[1] *Wynkoop* v. *Seal*, 13 M. R. 493.

[2] *Bowker* v. *Goodwin*, 10 M. R. 149.

Appeal from the District Court of the First Judicial District, Storey County.

It appears that Boylan, the plaintiff, on or about June 2, 1870, requested H. H. Flagg, a broker of Gold Hill, to purchase for him ten shares of stock in the Savage Mining Company. Flagg made the purchase and entered it on his books to the credit of Boylan. Afterward various transactions in mining stocks took place between them, until on or about February 2, 1872, when Flagg's books showed that he held to the credit of Boylan thirty shares of Savage stock, thirty shares of stock in the Alpha Mining Company, and that Boylan had paid up all that he owed Flagg. On February 3, 1872, Flagg failed, and in a day or two afterward made an assignment of all the mining stocks held by him to the defendants, H. Huguet, William N. Hall, Wilson Dunlap, Samuel W. Chubbuck and R. J. Butler, as assignees for the benefit of his creditors. Among other stocks so assigned and delivered to the defendants were eighty-nine shares of Savage and one hundred and forty-four shares of Alpha; but all that Flagg had and all his assignees ever received fell far short of being sufficient to fill all his contracts.

On February 26, 1872, Boylan demanded of the assignees thirty shares of Savage and thirty shares of Alpha stock, claiming the same to be his own property, received by them from Flagg; and upon and for their refusal to deliver the same he commenced an action of trover against them, laying his damages at $8,130. This amount he recovered; but upon defendants making a motion for a new trial, he confessed error, allowed the motion to be granted and thereupon dismissed the action, and on June 20, 1872, commenced this second action, laying his damages at $28,950, as stated in the opinion. The reason of this great difference in the amount of damages claimed appears to have been a great rise in the market price of stocks after the commencement of the first suit. On February 26, 1872, the time of the conversion, the market price of Savage was $216 per share and of Alpha $31 per share. In April following these stocks reached the highest price at any time attained between the time of conversion and trial of this, the second suit; that of Savage

being $650 and that of Alpha $185 per share. It was upon the basis of these latter named prices that the court below assessed the damages and rendered judgment in favor of plaintiff for $25,050. Defendants moved for a new trial, which was denied; and they then appealed from the judgment and order.

WILLIAMS & BIXLER, LEWIS & DEAL, for appellants.

MESSICK & WOOD and R. H. TAYLOR, for respondent.

By the Court, WHITMAN, C. J.

This action is trover, for the conversion of mining stock. Boylan, the respondent, dealt for a series of months with one Flagg, a broker of Gold Hill, Nevada, in the ordinary course of business. He gave orders which Flagg filled through his broker in San Francisco; and the purchases and sales as effected in the stock board there were reported to Boylan as the acts of Flagg. The former had no communication with the San Francisco broker; his account was kept entirely with Flagg, and at the time of Flagg's failure was fully paid up, and thirty shares of the stock of the Savage Mining Company and a like number of the stock of the Alpha Mining Company stood to his credit upon Flagg's books.

To the assignment for the benefit of his creditors, made by Flagg to appellants, respondent did not assent, but shortly thereafter notified them that he claimed the stocks before named; and on the twenty-sixth of February, 1872, he made formal demand therefor, upon refusal of which he commenced suit and recovered some eight thousand dollars. The appellants moved for a new trial; respondent confessed error, dismissed his suit and immediately instituted the present one, laying his damages at $28,950, of which he recovered $25,050.

At the time of the demand upon them, appellants held of the stocks assigned to them sufficient to satisfy respondent, though not enough to fill all Flagg's contracts; this is urged as an objection to respondent's recovery; but it is no element of this case, which has to do with its parties and not with strangers.

Appellants argue, first, that there should be no recovery; second, that, if any, the measure of damages should be different. The first point presents no difficulty; the second is more complicated. The transaction between Boylan and Flagg was one of every-day occurrence, which is perfectly well understood by the community and is well defined at law, in which the parties occupied the mutually double positions, first of principal and agent, secondly of pledgor and pledgee. To make the first purchase Flagg, acting as broker, advanced money which was charged to his customer, while at the same time the stock bought was credited to his account, held, however, as a pledge for the moneys advanced, commissions charged and whatever other items went to make up the sum of indebtedness. Upon full payment thereof and demand therefor Boylan was entitled to the possession of the stock. All increase or decrease in value while so held was to his account; if sold, the surplus proceeds were his, for it was his property from the moment of the purchase, subject to the lien before mentioned. This is clearly and conclusively the real position of the parties. It would seem self-evident; but let those who desire an elaboration of the matter see *Markham* v. *Jaudon*, 41 N. Y. 235.

It does not follow, however, that Boylan was entitled to receive the identical shares of stock purchased on his orders, if any were so specifically purchased; that was not the contract. Flagg, for the consideration of the market price of the stock, his commissions and other legitimate charges, agreed to buy for the respondent an interest in the Savage Mining Company equivalent to the number of shares ordered, and to deliver, as evidence of that interest, the certificates issued by the company to represent the same. It made no difference whether the certificate was number one or number one thousand, nor that he purchased number one and delivered number one thousand. So long as he held a certificate or certificates representing the requisite number of shares and was prepared to deliver them on payment and demand, so long was he within the terms of his contract; and though he might have used and re-used the identical certificates received on filling Boylan's orders, mixed them with others, destroyed them even, there was no conversion until he, or, as in this case, his voluntary assignees, refused to deliver upon demand; and so with the Alpha shares held

as security. There is no special value or property in any particular share of stock, unless issued in the name of a party and to him charged upon the books of a company, which does not appear to have been the fact in the present instance. Boylan's property and Flagg's charge were in so many shares, not in any particular shares.

Upon this refusal to deliver occurred the breach of contract, then the technical conversion. What should be the compensation for this wrong? From the general tenor of decisions in analogous cases it would seem in the absence of special cause of damage that the answer was clear: "The value of the property at time of breach of contract or conversion, with legal interest as damages for the detention of such value." The judgment herein was rendered upon a different theory, and was given for the highest market price between the conversion and the day of trial; and it is insisted by respondent that this is the rule with reference to property of fluctuating value.

That this is the rule in New York, subject to some meaningless exceptions, such as bringing suit within reasonable time, etc., there is no doubt. That some other States, notably Iowa, Pennsylvania and California, have substantially adopted this rule is true. Connecticut is sometimes ranked in the same line, but that is a mistake: *St. Peter's Church* v. *Beach*, 26 Conn. 356. California has endeavored to modify in some degree (*Page* v. *Fowler*, 39 Cal. 412), and New York shows its determination to recede, upon occasion made, in the following language of the entire Court of Appeals, by Church, Ch. J., pronouncing a recent opinion: "An unqualified rule giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, I am persuaded, can not be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character. Without intending to discuss this question at this time, we deem it proper to say that while the decisions and opinions of our predecessors will receive the utmost respect and consideration, we do not regard the rule referred to so firmly settled by authority as to be beyond the

reach of review, whenever an occasion shall render it necessary." *Matthews* v. *Coe*, 49 N. Y. 57. This is only dictum; but such dictum is very ominous of the fate of the New York rule.

It is not surprising that there is a desire to escape effects which are sometimes so absurd. As in this case, the first suit and recovery were for some eight thousand dollars; had that judgment stood, as it probably would have done but for the motion of appellants, the law would have declared that respondent was fully compensated for his loss consequent upon the wrongdoing of appellants; but that judgment having been set aside, it took over three times that amount to afford compensation only a few months after. In other words, damages were given which were purely speculative, which were not only not proven, but which were against all probable presumption, as human experience teaches that the man who sells his stock at the highest price is the rare exception to the generality of dealers. Yet the measure was correct if the rule be so; the suit had been brought seasonably, and prosecuted with diligence.

Looking at the assumed basis of this rule it is impossible to add anything to the exhaustive *resumé* of the decisions said to constitute its foundation, as given in *Suydam* v. *Jenkins*, 3 Sand. 614; but it is curious and, perhaps, not uninstructive to re-glance at them for a moment. And first the stock cases so called, which were writs of inquiry to assess damages on bonds given to replace stock; and they hold that if the stock has risen in value since the day when it should have been delivered, the price at the time of trial is to be the measure of damages: *Shepherd* v. *Johnson*, 2 East, 211; *McArthur* v. *Seaforth*, 2 Taunt. 257; *Downes* v. *Back*, 1 Stark. 318; *Harrison* v. *Harrison*, 1 C. & P. 413; *Owen* v. *Routh*, 14 C. B. 327. This upon the theory that the plaintiff wanted to keep his stock and therefore could only be indemnified by a verdict for money sufficient to replace it, as the defendant was bound to do. None of these cases hold, and *McArthur* v. *Seaforth* expressly negatives, the idea that the highest price at any intermediate day can be allowed.

This rule was followed in this State in an equity case to compel the transfer of certain shares of stock (*O'Meara* v.

North American M. Co., 2 Nev. 113) and is undoubtedly correct under similar circumstances either at law or in equity; but how it can justify the measure of damages allowed in this case is inexplicable; for here, and in like cases, courts never would allow the converted property to be restored in specie, except where it might be of such nature that its value could not have been changed; and the real question to be determined almost invariably is its worth, not that the party delinquent may replace it, as he would have been allowed to do in the cases cited, but that the injured party may be indemnified for its loss. When? Why, when he lost it, not before nor after, but at the time when the loss occurred.

There are a few other decisions which seem to have been rendered rather upon the desire to do justice in the particular case than upon general principles and which are hardly precedents for anything. In *Greening* v. *Wilkinson*, 1 Carr. & P. 625, trover for East India Company's warrants for cotton, the highest price either at time of conversion or subsequently, at jury's option, was given. Of this case Judge Duer says in *Suydam* v. *Jenkins*, *supra*: "It is, however, only a *nisi prius* decision, and the report is not only brief, but, we apprehend, imperfect; material facts seem to be omitted, nor is it stated what was the verdict finally rendered." That this is not the accepted rule appears from the uncontradicted remarks of counsel in *Elliott* v. *Hughes*, cited *post*. In *Archer* v. *Williams*, 2 Carr. & Kir. 27, action for the wrongful detention of scrip, Creswell, J., directed the jury to find the highest price between conversion and trial; this direction they disobeyed; and finally, in making up a bill of exceptions, the instruction was considered to have been that more than nominal damages were to be allowed; so that case is not authority in point. In *Shaw* v. *Holland*, 15 M. & W. 145, an action for non-delivery of railway shares, the same rule was applied as in *Gainsford* v. *Carroll*, 2 B. & C. 624, for non-delivery of goods; *i. e.*, the difference between the contract price and the market price on the day when the contract was broken; making the distinction, however, which is often found but which upon reflection will be seen to be none, that, the money not having been paid, it was in the power of the vendee to go into the market and buy and thus save himself, as if he was called upon to do so, and might not

rely upon his contract. In *Mercer* v. *Jones*, 3 Camp. 477, Lord Ellenborough lays down the rule in trover, "that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion," and applying it to the case in hand (trover for bills of exchange), disallowed interest after demand and refusal to deliver. Of this case, Abbott, Ch. J., is reported to have said in *Greening* v. *Wilkinson*, that it was hardly law. Thus the wisest disagree.

In a recent case at *nisi prius* the highest price of goods between the agreed date of delivery and time of trial was given; and the case is worthy to be quoted somewhat lengthily, as presenting a comical instance of reasoning in a circle to make a rule. Remembering that the New York rule is fathered on English decisions, hear counsel. The action was for non-delivery of hops contracted at five pounds ten shillings the hundred weight; they had risen from the time of delivery to seven pounds ten shillings, at which price they continued till the day of trial. To the offer by plaintiff of evidence to that effect, "Joseph Brown (with whom was Shee, Sergt.,) objected that such evidence was not admissible, as a series of cases had decided that the measure of damages for the non-delivery of goods purchased was the market price at the time of the breach of contract.

"McMahon (with whom was Digby Seymour) submitted that the rule applied only where the goods were not paid for at the time of the purchase, in which case it was said that the buyer not having parted with his money could go with it into the market and buy at the current price; but that a different rule prevailed where, as in the present case, the price was paid at the time of purchase. There was no case in which this precise point had been decided in the courts of this country, though there were several decisions upon it in the American courts. The nearest analogous cases in our courts were those relating to the loan of stock, in which it was decided that on the failure to return it the lender was entitled to recover the highest price up to the day of trial. * * * His lordship (Byles, J.) said * * * he would rule that the plaintiff was entitled to recover the value of the hops at the price of the present day, but would give the defendant leave to move to reduce the damages if the court should think

he was wrong." *Elliott* v. *Hughes*, 3 F. & F. 387. No motion was made to reduce; so the case stands decided upon American authority, there being confessedly none English; while, on the other hand, the American cases claim English parentage.

The fact is, there is no such well-established rule. There have been exceptional instances of granting this measure of damages, probably with the laudable desire of doing exact justice at the moment in an individual case. There has also been an attempt to make these exceptions the rule; but that has not prevailed, nor should it; for the purpose of the law is to make the nearest practicable approach to justice in all cases; and that can only be attained by the preservation of fundamental principles. What are they in cases like the one at bar? To that question there can be but one answer; all the authorities concur. Complete indemnity to the party injured, but no punishment to the wrongdoer.

To accomplish this end all damages must be given which necessarily flow from the wrongful act. Those are the value of the property at the time of conversion, for that is what one has found and the other lost, together with damages for the detention of that value, which is legal interest from conversion to judgment, and in addition any special damage which may legitimately arise out of matters in existence at the date of the tort.

This rule does not militate against any former decision of this court, and agrees with its dicta in *O'Meara* v. *North Am. M. Co.*, 2 Nev. 113; *Prescott* v. *Wells, Fargo & Co.*, 3 Nev. 82; *Carlyon* v. *Lannan*, 4 Nev. 156; *Bowker* v. *Goodwin*, 7 Nev. 135. It dissents from the letter of a few American and English decisions—the former in their incipiency shown in *Suydam* v. *Jenkins* to have been ill founded, while the latter are equally so. With the spirit and object of all authorities —complete indemnity to the injured party—it concurs; and it is believed it will prove to be productive of equal justice between litigants, giving indemnity while repressing speculation, enforcing restitution but repudiating punishment.

As the action of the district court was utterly at variance with the rule adopted, it follows that the case must be sent back.

The order and judgment appealed from are reversed and cause remanded for a new trial.

[1]KUHN, Respondent, v. MCALLISTER, Appellant.

(1 Utah, 273. Supreme Court, 1875.)

Forms of action under the code. Under our Practice Act it is immaterial whether the language used in the complaint be that belonging to one form of action or another, or to no form of action; the material question is, do the facts stated show that the plaintiff is entitled to any remedy, legal or equitable.

"Shares" of stock in conversion. Shares of stock in an incorporated company are recognized as a subject of conversion, and suit can be maintained therefor and a recovery of the value had.

Repeated conversion. In an action for conversion of stock, it is no defense that some other party took the property in the first instance.

Want of diligence in making motion. When the demurrer of defendant was overruled more than six months before he moved to be allowed to answer: *held*, want of diligence and a motion to be denied.

Default—Reliance upon third parties. It is no excuse, in a motion to set aside a default, that the defendant had relied upon the promises of others.

Appeal from the Third District Court.

The facts appear in the opinion.

SUTHERLAND & BATES, for appellant.

TILFORD & HAGAN, for respondent.

BOREMAN, J., delivered the opinion of the court.

This is a suit to recover damages for the conversion, by the defendant, of two hundred and fifty shares of capital stock of a mining company.

In the court below judgment went against the defendant by default, and defendant has appealed to this court, and now here alleges that the complaint does not state facts sufficient to constitute a cause of action. The insufficiency is alleged to consist in bringing this suit for damages for the conversion of "shares" of stock, as "shares" are incorporeal, and a party can not be charged with taking and converting the same, or,

[1] Affirmed in *McAllister* v. *Kuhn*, 96 U. S. 87.

in other words, that this is an action of trover, and that trover can not be maintained for shares of stock. We do not think that this is exactly the question which we are called upon to consider. It is not necessary for us to consider that this is an action of trover, and that trover is not the proper remedy.

To do so would be to tie the pleadings down again to set forms. Some of the language used may be that used in trover, but some certainly is not, and it matters very little under the Practice Act, whether the language used be that belonging to the form of one action or another, or to no form of action. The material question is, do the facts stated show the plaintiff entitled to any remedy, legal or equitable. If so then the court could not say that the complaint did not state facts sufficient to constitute a cause of action.

It is asserted that the defendant "took" these shares, and great stress is laid upon that word. If this were an action in trover, that word would not be proper; it belongs to replevin, but the word "found" would take its place; yet whether the one or the other word be used, it would in trover be not very material, as the gist of the action is the conversion.

But can not a man convert shares in stock? He can mortgage them; they can be sold under judgment and execution; they can be attached; and they can be pledged: *Wilson* v. *Little*, 2 N. Y. 443.

At common law, strictly speaking, shares could neither be mortgaged, sold under execution, attached or pledged. This rule has, however, been greatly relaxed, in some instances by statute and in others by the rulings of the courts. Joint stock companies are becoming so numerous, and so large an amount of the property of the community is invested in them, that it becomes a necessity to treat stocks very much as other personal property. Hence we find in Massachusetts it is held that a contract for the sale of shares in a manufacturing company is a contract for the sale of goods, wares and merchandise: *Tisdale* v. *Harris*, 20 Pick. 9. And where, in New York, stock has been wrongfully converted by a trustee, the *cestui que trust* may either compel a re-delivery of the stock or claim the value at the time of the conversion: *Hart* v. *Ten Eyck*, 2 Johns. Ch. 117. This more modern and liberal rule is recognized also in California: *Atkins* v. *Gamble*, 42 Cal. 100.

And in New York we find that stock is recognized as a subject of conversion, and suit can be brought therefor, and a recovery of the value had: *Anderson* v. *Nicholas*, 28 N. Y. 600.

Likewise in Nevada we find the right to sue for the conversion of stock. In 8 Nevada, 352, *Boylan* v. *Huguet*, there is a case of this character. It is an action in trover for the conversion of mining stock. The rule seems to be settling down to be that shares are to be treated as other personal property. The word "share" seems to be used much of the time in the reports as including the certificate—which certainly is tangible—and in the case before us the word share is declared to be embraced in the certificate, and if the share be taken, it necessarily follows that the certificate was. But this is not left to mere inference, for the complaint says that defendant "took the said two hundred and fifty shares described as aforesaid." They were described as contained in and represented by "the certificates." But formerly at common law, the certificates were in the same situation as the shares, for neither could be the subject of an action of trover. It is admitted by the appellant that trover can be maintained for certificates of stock. From what we have said, therefore, we conclude that the complaint is sufficient to support the judgment.

Upon the application to set aside the judgment and default, affidavits filed show that Richard W. McAllister took the shares, but that he was intrusted with the whole matter by the defendant for whom he was acting. He was thus the agent of the defendant. This fact does not show merits in the defense, for the action of Richard W. was the action of the defendant. As to the conversion, it makes no matter of difference that some other party took the property in the first instance: *Briggs* v. *Wangenheim*, Cal. S. C. Oct. 7, 1869. Where "certificates of stock" were even purchased from another, the holder was liable if they were wrongfully taken from the owner, and the purchaser had reason to suspect this: *Anderson* v. *Nicholas*, 28 N. Y. 600. The witnesses seem to swear to all they know about the case, yet we can discover no special merits that would justify a reversal of the action of the court below, even if the defendant did show proper diligence. And we do not think any diligence whatever was used; certainly no reasonable diligence was used. The action was begun on the 9th of

September, 1873, and upon the following day defendant was served with the summons. On the 18th of said September he appeared and demurred. On the 15th of April, 1874, he withdrew the demurrer and took ten days in which to answer. On the 28th of the same month (April), no answer having been filed, default was entered. Then on the 13th of October following, nearly six months after default, plaintiff introduced his proof, and judgment was entered in his favor. Afterward, on the 29th of October, defendant filed his motion to vacate the judgment and set aside the default, having given notice on the same day. The motion was denied, and a few days afterward renewed. We do not think this shows very great diligence, especially when we remember that the affidavits allege that the defendant was the acting officer of the very court in which this case was pending. The only excuse given for the negligence is that he depended upon the words of other men in regard to making him safe. If such negligence can be excusable in one case it should be so in all. But if admitted as good, it would lead to great confusion, and parties would never know when their cases were really settled. The judgment and subsequent action of the court below is affirmed.

Judgment affirmed.

LOWE, C. J., concurs.

PAYNE v. ELLIOT ET AL.

(54 California, 339. Supreme Court, 1880.)

Certificates and shares distinguished. An action in the nature of trover will lie under modern decisions for the conversion of *shares of stock* as well as for the mere *certificate*. The scope of the action has been enlarged from what it was at common law.

Civil imprisonment for fraud. A judgment of imprisonment will not be sustained upon a general averment that defendants "are guilty of fraud." The facts upon which the charge of fraud is based must be specifically alleged in the complaint.

Appeal from a judgment for the plaintiff, in the Twelfth District Court, City and County of San Francisco. DAINGERFIELD, J.

The facts are stated in the opinion.

J. M. SEAWELL, for appellants.

L. QUINT, for respondent.

Department No. 1, McKEE, J.

This is an action of trover. The plaintiff seeks to charge defendants with $2,796.32 and costs, for an alleged conversion of one hundred shares of the stock of the "Northern Belle Mill and Mining Company," and also to have them adjudged guilty of fraud. The complaint was demurred to on several grounds, and the demurrer overruled. Defendants afterward answered, and, upon a trial had in the absence of defendants and their attorneys, the court gave judgment for the plaintiff for the amount sued for, in gold coin, and also adjudged that the defendants were guilty of fraud. The appeal comes to this court upon the judgment roll, and the appellants claim that the lower court erred in overruling defendants' demurrer to the complaint, upon the grounds that there is no allegation that the plaintiff owned, or that the defendants converted, any *certificates* of shares of stock; and that the allegation of fraud is insufficient to sustain the judgment that the defendants were guilty of fraud in the supposed conversion. The principal question is, whether shares of stock, *eo nomine*, are property for which an action, in the nature of an action of trover, can be maintained.

At common law, trover was the proper remedy for a conversion of personal property; but it lay only for tangible property, capable of being identified and taken into actual possession. The conversion of the property was the gist of the action; and the action did not lie, unless the defendant had become actually possessed of the property by some means, whether of finding or otherwise. Shares of stock, and such things, did not belong to that class of property known as chattels; they were considered incorporeal, intangible things, which existed in idea, and were incapable of being subjected to actual possession. Nor were they supposed to denote possession; for they had no other evidence of an existence than the certificate which was issued

to the person who claimed the right to what the certificate represented. That right consists of the privilege of voting in the concerns of the corporation, and of participating in the profits of the business of the corporation. It subsisted only in law or contract. It was a right to a thing not in possession, but in action. The certificates themselves were not considered property, but were considered evidence of property. Wherever common law ideas of personal property prevail, courts hold that trover is not the proper remedy for the conversion of things which were considered at common law as mere personal rights, not reducible into possession, but recoverable by law. So, the Supreme Court of Pennsylvania has held that trover will not lie to recover damages for shares of bank stock; and, says Justice Sharswood, "the principle applies to all other corporation stocks." A share of stock, say the court, "is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm." *Neiler* v. *Kelley*, 69 Pa. 407.

Upon the idea that shares of stock can not be taken away or wrongfully detained from the owner, or that they can not be lost by the owner or found by a stranger, there is no doubt of the soundness of that decision. But the fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become, in the progress of law, an unmeaning thing, which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property. It lies for bank notes sealed in a letter: *Moody* v. *Keeney*, 7 Port. (Ala.) 218; for negotiable instruments: *Comparet* v. *Burr*, 5 Blackf. 419; for a judgment: *Hudspeth* v. *Wilson*, 2 Dev. (N. C.) 372; for a promissory note which has been paid: *Pierce* v. *Gilson*, 9 Vt. 216; for copies of a creditor's account: *Fullam* v. *Cummings*, 16 Vt. 697; for a writ of execution issued on a judgment: *Keeler* v. *Fassett*, 21 Vt. 539; and for *certificates* of shares of

stock: *Anderson* v. *Nicholas*, 28 N. Y. 600; *Atkins* v. *Gamble*, 42 Cal. 98; *Von Schmidt* v. *Bourn*, 50 Id. 616.

At the same time that the action has been thus expanded, the words "things in action" have undergone such a development from their original meaning, that they now represent things to the imagination in the light of tangible objects; and, as such, they are the subject of contract, sale, gift, mortgage, bailment and pledge; and, under the provisions of our codes, they are personal property, subject to taxation, attachment, execution, levy, and sale. Sections 542, 688, Code Civ. Proc.

It is, therefore, the "shares of stock" which constitute the property which belongs to the shareholder. Otherwise, the property would be in the certificate; but the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder; the certificate is, therefore, but additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents. For, as the Supreme Court of Connecticut say, "If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted—that the conversion of the paper constitutes the entire wrong. The real act done in such cases is precisely the same as that done here—no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. * * * The stock in both cases was converted; and we think that in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained." *Ayres* v. *French*, 41 Conn. 151. In *Boylan* v. *Huguet*, 8 Nev. 352, and in *Kuhn* v. *McAllister*, 1 Utah, 273, actions of this character for "shares of stock" were sustained. It follows that the court below did not err in overruling the demurrer to the complaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial.

But the judgment for fraud exceeds the relief to which the plaintiff was entitled by his complaint; for the only averments upon the subject of fraud are: "That the defendants received said shares of stock in a fiduciary capacity, as the agents of this plaintiff and not otherwise;" and "that defendants were and are guilty of fraud in receiving and converting said stock to their own use." It is not altogether clear how a person is chargeable with fraud by receiving shares of stock in a fiduciary capacity; for, as the term "fiduciary" imports, the defendants must have received them rightfully to hold in trust for the plaintiff. But if the defendants, as trustees of the plaintiff, fraudulently converted the stock to their own use, the facts which constituted the imputed fraud should have been stated; for fraud is never presumed, but must be proved; and to be proved, the facts upon which the charge is based must be specifically alleged in the complaint: *Davis* v. *Robinson*, 10 Cal. 412.

Without any issuable averments upon the subject, the court finds "that the defendants were the agents of the plaintiff; that the plaintiff delivered the stock to them to hold as security for the payment of $409 which he owed to them, and that they received it in the course of their employment as such agents and in a fiduciary capacity." Upon these findings the court "adjudged the defendants guilty of having fraudulently misapplied and converted said one hundred shares of the capital stock of the Northern Belle Mill and Mining Company to their own use, and that the defendants be arrested and held in custody until they pay the amount of this judgment, or until they shall otherwise be legally discharged from custody." The judgment in this respect is not warranted by the case stated in the complaint or the findings.

Some time after the judgment had been rendered, the court below undertook, by an order entered upon the minutes of the court, to modify it by "striking out the last six lines therein"; but that does not cure the error. The judgment convicting the defendants of fraud and ordering their arrest should be vacated.

It is hardly necessary to remand the cause for a new trial for that purpose, but the court below is directed to strike from the judgment the following matter, viz.: "And that plaintiff

is entitled to an order of arrest against said defendants until the same shall be paid. * * * And it is further ordered, adjudged and decreed that defendants were the agents of the said plaintiff, and that they received one hundred shares of the capital stock of the Northern Belle Mill and Mining Company, of the value of $2,950. That they received the same as the agents of the said plaintiff, and in a fiduciary capacity, and refused to deliver the same to plaintiff, on demand; and that they, the said defendants, converted the same to their own use, and against the will or consent of said plaintiff, by reason of which they are hereby adjudged guilty of fraud. And it is further ordered, adjudged and decreed that said defendants be arrested, and held in custody until they pay the amount of this judgment, or until they otherwise legally be discharged from custody."

Thus modified, the judgment is affirmed.

McKINSTRY, P. J., and ROSS, J., concurred.

1. Trover will lie in Nova Scotia for minerals taken from a mine out of the province and removed within it: *Gesner* v. *Gas Co.*, 1 James (N. S.) 72.

2. Trover lies for value of oil taken from plaintiff's well: *Hail* v. *Reed*, 11 M. R. 103.

3. Trover for copper ore obtained through a shaft on plaintiff's land sunk to reach a lode which defendant was already working: *Rowe* v. *Brenton*, 8 B. & C. 737.

4. Trover for produce of mines by mortgagee: *Fraser* v. *Swansea Canal Nav.*, 3 Nev. & Man. 391.

5. In trover for converting coals against several defendants, there may be a verdict of guilty as to parcel of the property and not guilty as to the residue; and though the defendants are found severally guilty there may be but one judgment: *Player* v. *Warn*, Cro. Car. 54.

6. One is guilty of trover who sells stock without authority from the owner though he act under direction of one claiming to be the owner, and is ignorant of the true title: *Bercich* v. *Marye*, 13 M. R. 544. *Bona fide* owner of stolen stock acquires no title although the stock had been indorsed: *Barstow* v. *Savage M. Co.*, 64 Cal. 388; 49 Am. R. 705.

7. Trover will not lie against lessee of salines for petroleum which had risen naturally with water from the salt well and had then been separated and sold by the lessee: *Kier* v. *Peterson*, 8 M. R. 499.

8. The measure of damages for taking coal is the same in trover as in trespass: *McLean Co. C. Co.* v. *Long*, 10 M. R. 193; *Lyon* v. *Gormley*, 5 M. R. 383.

9. Trover will lie against the purchaser of soil severed by a trespasser: *Riley* v. *Boston Co.*, 11 Cush. 11.

10. Defendant entered on land where plaintiff had lime-kilns: *held*, no conversion of the lime by entry on the land without asportation, until demand and refusal: *Thorogood* v. *Robinson*, 6 Q. B. 769.

11. The sale of personalty by an officer amounts to a conversion whether he removed the property or not: *Scudder* v. *Anderson*, 19 N. W. 775; 54 Mich. 122.

12. Suit against tank company for conversion; right to offset charges and allowances for evaporation: *Cow Run Co.* v. *Lehmer*, 41 Oh. St. 384.

13. Lessees may recover in trover for ore taken from their mine by strangers, on their possession alone, their lease being defective: *Taylor* v. *Parry*, 1 M. & G. 604.

WILKINSON v. STAFFORD

(1 Vesey, Jr., 32. High Court of Chancery, 1789.)

Account against trustee renouncing trust. Account decreed against a trustee who, having engaged the trust property in an adventure, afterward renounced it for the trust, and declared it to be on his own account, though no part of the trust money had been actually laid out.

[1] **Trustees, when not accountable.** Trustees not answerable for having applied the trust property even to what turned out a losing adventure, if without fraud or negligence.

Trustee using infant's name but not his funds. Trustee not answerable for having engaged the infant's name in an adventure if, afraid of the consequences, he does not engage the property. (*Contra, Morton Eden's* case in the House of Lords.)

[2] **Trustee can not buy or sell.** Trustee having engaged trust property in an adventure, can not sell either to himself or another.

[3] **No election allowed to trustee.** The court views trustees with jealousy; and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit as he pleases.

Compromise with a man in jail, though not at the suit of the party with whom it is made, disfavored, and on the facts in this case, disallowed.

Smithson, Sen., was seized and possessed of several freehold and leasehold parts of Berkeley colliery in Durham, together with the way-leaves, wagon-ways, steaths[4] and other accommodations appertaining to them, in partnership with Humble, who was also settled, and possessed in his own right of other freehold and leasehold parts of the same colliery. The keel trade, namely, the keels of barges, and the profits arising from fitting[5] the coals and conveying them to the ships, belonged exclusively to Smithson alone. Smithson died in 1766, having devised his moiety of the said collieries with all his interest in the way-leaves, wagon-ways, steaths, keels, etc., and all his ready money, debts to be called in, and his iron chest, to his two sons-in-law, Moore and Stafford, and his two clerks, Nicholson and Waterland, who had principally

[1] *Cromie* v. *Bull*, 81 Ky. 646.

[2] *Lathrop* v. *Pollard*, 6 Colo. 424; *Wightwick* v. *Lord*, 6 H. L. Ca. 217.

[3] Where funds are mixed by a trustee, the *cestui que trust* may elect to take the profits of the adventure: *Docker* v. *Somes*, 2 Mylne & Keen, 664.

[4] Places on the bank of the river whence the coals are shot into barges to be conveyed to the ships.

[5] Shooting coals from the steaths into the keels.

carried on the business for him, and whom he desired to be retained for that purpose, in trust for his three grandchildren, till they should attain the age of twenty-one, to carry on the said collieries in the same manner he had done, and to use his keels, way-leaves, etc., and not to advance or lay out any more money upon the said collieries without the consent of all the trustees or the survivors; but after deducting the necessary expenses of carrying it on, and of maintenance for the devisees, to lay out the surplus upon security at interest for his three grandchildren, to be paid them at the age of twenty-one, with a bequest over if they should die before that age. The keels and the profits of that trade he gave exclusively to his grandson, Smithson, one of the devisees. After the death of the testator the trustees carried on the trade under the will in partnership with Humble. Soon after, in 1766, Moore and Waterland being dead, Humble, Nicholson and Stafford entered into an agreement by deed, to carry on the collieries they had, and any other they should take, in partnership. In 1768 Humble agreed to purchase another colliery called Topt-hill, when the existing lease should expire, in 1769. Upon that account his purchase was not completed till the 30th of July, 1770, when a fine was levied. The purchase money was £4,185, to be paid by installments of £1,100 every year, till the whole should be paid off. Upon the 6th of April, 1770, they began to work this new colliery and continued to work it with the Berkeley colliery; and in consequence of a regulation among the trade that only a limited quantity of coal should be raised, the same quantity that before was sent from the Berkeley colliery alone was afterward supplied by both. Upon the 31st of July, 1770, a deed was executed by Stafford renouncing any concern in the Topt-hill colliery in right of the trust estate, and declaring that his interest in it was upon his own account. Smithson being on very bad terms with his uncle, Stafford, in 1786, filed a bill calling on him to account for a third of a moiety of the profits of the Topt-hill colliery, and all the profits of fittage, etc., and afterward made a general assignment of all his property, real and personal, to the plaintiff; and being in very bad circumstances, was arrested at the suit of an inn-keeper for £16, and a detainer was lodged against him for another small debt. While he was in prison a treaty was set on foot for a com-

promise between his uncle and him, which, after a delay of two years occasioned by the claim plaintiff would have by the assignment, was completed; and Smithson executed a release to Stafford, in consideration of £500, with part of which sum he was set at liberty. The plaintiff filed a supplemental bill. The defendant was himself entitled to the other two thirds of the collieries devised by assignment of his son, one of the devisees, and of the representatives of the other, who was dead. It was proved that the plaintiff was a trustee for Smithson in several transactions, and that defendant knew that plaintiff had sold some houses for him.

SOLICITOR GENERAL and Mr. MITFORD, for plaintiff.

This compromise will not interfere with the relief prayed, because executed in such a manner. It is proved that defendant knew plaintiff had acted as agent for Smithson on several occasions, and his knowledge of the assignment occasioned by the delay of the compromise. Therefore he is affected with notice. If Smithson had not made that assignment, which was general, he would himself have been entitled to the account of the profits of this colliery, which was taken and improperly given up by the trustees. Testator intended his collieries should be carried on for the benefit of the devisees, but the working the Topt-hill colliery was exceedingly prejudicial to those of Berkeley; for the quantity of coals to be sent to the London market being limited in consequence of the regulation of the trade, and the two collieries being, in consequence of the agreement of 1766 between Humble and the trustees considered and worked as one, the same quantity of coals which might have been got from Berkeley alone were after that taken from both; and consequently the Berkeley colliery was not worked out so soon, and so a greater expense caused to the proprietors. Besides, the way-leaves and other accommodations of the Berkeley were exceedingly convenient, if not absolutely necessary, for working the Topt-hill. The agreement between Humble and the trustee was probably to prevent the separation of those parts of the colliery which Humble held in partnership with the trust estate from those which he had in his own right. That deed was intended to carry on the coll-

ieries in partnership, and to take new leases of collieries, way-leaves, etc. It is only necessary to inquire whether this colliery was taken for the purposes of that agreement. It was recited in the instruments that it was taken on the footing of the partnership, which was for the benefit of the trust estate, not for their own; therefore to be worked in moieties for Humble and the trust estate. It certainly was managed for the trust till execution of the deed of renunciation, which was subsequent to the time of beginning to work the colliery; and there was no reason to execute that instrument unless it was considered that the right did before exist in the *cestui que trust*. The renunciation was upon terms stipulating benefits for the trust estate. It was clearly a species of bargain between Humble and the trustees acting for themselves. The way-leaves obtained by persons interested in Smithson's collieries could only be used by those claiming under them; therefore to work the Topt-hill it was necessary that new way-leaves should be provided, or that it should be worked with the other. A trustee is not to deal for his own benefit with himself. This court will make him answerable for the consequences, whether an advantage or a loss. The parties knew that rule; for they recite that the trustees, doubtfulof the success of the undertaking, declined engaging the trust estate therein. It is proved by Humble and others that the colliery had been effectually won before; all that remained was what is called the second working, which consists in digging out the pillars which had been left, after the first, to support the roof, but which are much larger than necessary merely for that, this being the usual way of working coal mines, and attended with no hazard, except that they must take certain precautions against what they call creeps and thrusts, the former being where the damage arises at the bottom, the latter where the roof falls in. Upon the day of renunciation it was capable of being worked to advantage. Defendant ought, if he meant to deny this, to show that at the time of this agreement a survey had been taken of the state of the colliery, and that it would be attended with hazard. Any trustee meaning to act fairly would have done so. He does not say that anything arose previously to alter the case. He was not apprehensive of engaging the trust property in an adventure, for he did engage it in another

colliery called Hag-green, which he was to win as well as work, which is much more hazardous. Supposing the trust estate to be entitled to a moiety of the profits of the colliery, the question of fittage follows of course. Under the will defendant could not have fitted any part with his own keels. That being contrary to the will he must have accounted for all the profits of the transaction. Supposing the other question determined, there is no difference between the Topt-hill colliery and the others in which testator was engaged.

Mr. MANSFIELD and Mr. SCAFE, for defendant.

If the release was fairly obtained, and no notice of the assignment, that is an answer to the bill. It was perfectly fair, not solicited by the defendant, but it was by Smithson and by many for him, and was considered as an act of bounty to a nephew. There is nothing in the assignment that can include this demand, nor notice to the defendant that it did. He knew some houses were sold by plaintiff acting as agent for Smithson, but nothing more. This demand being of so peculiar a nature, such a release is not undone by this assignment and such notice. There is no case where a trustee has been called on to account for the profits of an estate bought with his own money and worked at his own risk. There is a talk of damage to the trust estate in the bill and evidence, but none proved. If he had pursued any conduct injurious to it, he, as a trustee, might be made to answer for it; but this bill does not apply to such a case, being confined to an account of a third of a moiety of the profits of the colliery and all profits of fittage. If the demand is to be made out at all it must be upon the words of the will. The trusts are to carry on the collieries of the testator and use his keels as he had done; but there is nothing authorizing them to take a lease of, much less to purchase, any new colliery; but the direction to put out to interest for the benefit of his grandchildren all the surplus remaining, after deducting the necessary expenses of the said colliery, shows clearly an intention that the trustees should not think of embarking in any new undertaking for the trust, but they might at their own risk.

LORD CHANCELLOR.—You had better consider it upon the

words of the will. It says they are not to lay out any more money upon the colliery without consent of all the trustees, from which seems to be implied, that with the consent of all it might be done; and there seems to be no other way but by taking new leases.

For Defendant.—One great article is for employing workmen, another for steaths, another for keels and barges; but not to engage in new collieries. The words "said collieries" go through the whole will. That express direction to put out the surplus money to interest would, even if there had been no express restriction against taking new collieries, have amounted to one. They had no authority to do so, especially in this hazardous trade.

LORD CHANCELLOR.—They surely might have taken new leases of steaths.

For Defendant.—If it became necessary for the collieries they had in trust to provide new steaths, keels etc., they might do so; not otherwise. They might do anything absolutely necessary for carrying on those collieries, but could not embark in a new adventure. This is not a trust estate under the will. To make it so this supposed damage is taken in aid to make defendant a trustee for Smithson; but that will not help the question. Suppose the trust estate had suffered; the trustee must make good any injury done to it by his imprudent conduct; but that would not give any demand on this colliery. Suppose it taken without any reference to the trust, and that mischief happened to the trust estate; the new colliery could not be expected to answer it; but the trust estate would, notwithstanding, have a competent remedy; therefore the question of damage has nothing to do with that of trust. The question is, whether there is anything in the case to determine that the Topt-hill colliery was taken and worked for the trust estate, and so taken that it could not be given up, so as to be separated from it, and to be taken for the benefit of the trustee himself. In the partnership deed of 1766 there is nothing of the trust estate; but I do not dispute that it was in their contemplation at the time. There is no proof this colliery was ever worked for the trust estate, and it is denied in the answer. The agreement of 1766 was not with a particular view to the trust estate. When Humble took this

lease he took it under the idea that by the deed of 1766 he was bound to take it for himself, Nicholson and Stafford. The day after the title was complete, the renunciation as to the trust took place. If they were obliged to take it on account of the trust it could only be by the deed of 1766; for the will forbids, or at least does not direct them to do so. Half of the purchase money, which was a considerable sum, was to be paid by the defendant. If that colliery had gone to ruin, and the defendant had been brought to account for £2,000 laid out upon it, he would have been told he could not thus adventure the trust money. He understood that and determined not to engage it. If he had parted with the trust money, it might be said that if he made great advantage of it, he should account for that, though he should not be cleared in case of a loss. But it is not so; the first installment upon the 3d of March was paid with his own money; it is not pretended that it was with the trust money. It was an actual purchase subject to risk from its nature, in which a trustee was not at liberty to adventure. If he had consulted a lawyer he would have been told so; and when the thing was entire and nothing advanced out of the trust estate, it was competent to him to say he would not, though he had intended it, but would embark in it on his own account. If the trustees had expressed it to have been taken on the trust account they would have been wise in putting an end to it, and were competent to do so, having created the obligation. Any man in his senses would have retracted. One creep is proved, whereby seven or eight acres were lost. The manner of the transaction is strongly in his favor. Though he would not engage the trust property in this uncertain adventure, he stipulated for it every advantage he could by stipulating for a compensation for the use of the way-leaves, etc.; that 3,000 chaldrons should be fitted in the keels of the trust estate; and that Humble, who had a right to carry down those way-leaves 6,000 chaldrons from the Leefield colliery, belonging to him in his own right, should be restrained from the exercise of that right during the working of the Topt-hill; from which the same quantity was to be carried down them. The other trustee acted in concert with defendant. The profits of fittage would have been much smaller if the price of coals had continued as in 1770. But, by

what those in the trade call a regulation, and others call a combination, the price was raised, and consequently the profits increased. Therefore it was not to be considered at the time as a very advantageous bargain, and that defendant was induced by that circumstance to renounce for the trust and take it himself.

LORD CHANCELLOR.—The great difficulty is as to his having taken it himself. Can a trustee abandon the interest of an infant *cestui que trust* to himself? Your argument must go to that point. Supposing he had been directed by the will to lay out the money in land; if, having made a bargain, he thought fit afterward to abandon it, there could be no question about it. It would be considered that he had made what he afterward thought to be an improvident bargain. But the doubt is upon his having taken it himself and made advantage of it.

For Defendant.—The general rule is, that a trustee having an estate in his hands can not deal with that estate for his own advantage; but there is no case that if a trustee makes a bargain for the infant, and afterward thinks there is good reason to abandon it for the infant, and take it himself, he may not do so. But I might admit that. For what I found myself upon is, that there is no direction in the will of that sort; if there was it might be otherwise. This is no otherwise taken for the trust, than as Humble thought himself bound by the deed of 1766 to take it for the partnership; and they recite that they thought themselves bound when they came to talk of it; but it was never worked for the trust. It is said, but not proved, that they had taken another colliery for the trust. I should not have been sorry to have that fully explained; for in fact there was a lease of a colliery, with liberty to determine the lease if he should find it not workable; which is very different from this. But the question of fittage, if the other question should be doubtful, does not follow the right to the colliery. Defendant was a fitter; and there is nothing to restrain him from carrying on his own trade, because he took a trust. A trustee can not be prevented, by the circumstance of being so, from carrying on his own trade. Suppose the colliery was taken for the trust, he might certainly employ his own keels or those of any other

fitter. If he had taken the colliery fraudulently, with a view to take advantage in fitting, it might be said it was a breach of trust with a view to the profits of fittage; but he acted in his regular business, and there was no trust upon him to employ the keels of the testator except as to the Berkeley colliery As to the damage, it is scarcely made out by evidence that any did arise to the Berkeley; it was worked out in seven or eight years after. The delay was occasioned by the regulation, and was compensated by a sale at a better price. Their being worked as one colliery made no difference, for when the regulation took place, a greater portion of coals was allotted to them on that account. This can not be considered as a security under the will, for £2,000 was sunk in the purchase. It is more hazardous than a new colliery on account of the thrusts and creeps, and more expensive from the timber necessary to support the roof; therefore he would not have been justified in doing it with the trust property. The lease was granted to Humble alone; defendant was not mentioned except in the deed of the 31st of July, wherein he declines engaging the trust money.

LORD CHANCELLOR.—I have no doubt about the case. The testator was possessed, among other things, of these two articles of property: An interest in coal mines, consisting of several freehold and leasehold collieries in partnership with Humble, who also had some freehold and leasehold collieries of his own; in fact, all the testator's interest in the collieries was carried on in partnership with Humble, and they mutually communicated their private interests to each other. They were under no contract of perpetual duration, but it was a voluntary contract that had proceeded down to the time of making of his will, and even down to his death. These interests consisted not only of the coals to be taken from each estate respectively, and in common, but also of the several accommodations of way-leaves, steaths, etc. He had also an interest in the keel trade; that is, that establishment of vessels by which the coals are conveyed to the ships, for which there is a customary payment. This branch of the trade was exclusively his; Humble had nothing to do with it. By his will he bequeathed all his estate to trustees. It is immaterial to state more of it than is in question in this cause. He gave all his

interest in the collieries with the accommodations I have mentioned, to trustees upon trust; first, for the maintenance of his three grandchildren, then to carry on the adventure in the same manner he had done. The adventure, by the will, was to be carried on till the devisees arrived at the age of twenty-one. There were other contingencies in the will; as, upon the death of the grandchildren before twenty-one, it was to go over to others of the family, and it is necessary to remark that it was in his contemplation that there might be an accumulation. The keels he gave to the sole use of his grandson, Smithson. Upon this will it was contended that he did not empower the trustees to manage any colliery but those testator had at the time of making the will, or, at least. at the time of his death; but that is a very improbable idea to impute to the testator, that having this sort of property he should direct it to be carried on at all, if under restrictions which, in certain events, would be inconvenient; as if Humble should not agree, and without his agreement it would be impossible to be carried on at all. Besides, the accommodations were taken for a general, not a particular adventure. The testator directs that all his ready money, debts to be called in, etc., together with his iron chest, shall be given by his executors to Nicholson, his clerk, one of the trustees, to carry on the same. It then proceeds to say, "I hereby order that no more money shall be advanced for it without the consent of all the trustees, or the survivor of them; but all above the necessary expenses of the colliery to be laid out upon security at interest." Upon that clause it can not be contended that it can relate to any other trade than that in which the grandchildren were interested (for it seems he was engaged in two trades). Upon the face and terms of the will, exclusively of the general intention, I am of opinion that, provided these parties had, without fraud, but with the utmost skill and diligence they could use, applied this property even to what had turned out a losing adventure, they would have been justified. But it does not depend upon the particular construction of the will alone, for in the year 1766 they put the same construction upon this will that I have done by entering into an agreement with Humble of this sort, and this is what the testator intended. As he had a power to direct the manner, and did

direct it, they took it they were to proceed in that manner; they agree to carry it on as an improving and extending adventure, and by so agreeing to carry it on have bound themselves to each other as much and as anxiously as possible by mutually consenting not to take any estate of that sort separately from the partnership and that whoever took a lease, it should be for the mutual benefit of all. They were to take way-leaves, etc., for the new adventure; they took way-leaves which were accommodated to the collieries they had taken. With regard to the Hag-green colliery they proceeded upon this idea, and accounted for that. They had taken it with a view to this extent of adventure. In 1768 a reversionary lease of the Topt-hill colliery was taken. It was not worked out, but consisted only of walls and pillars, which every person who knows that country and the custom of it knows are of much greater size than is necessary for the mere purpose of supporting the roof. It is their manner of working them, and must be done at this risk, which frequently occasions the loss of many lives. This lease was taken by Humble in 1768. The price was to be subject to such abatement as the peculiarity of the property should require, and was to be discharged by installments of £1,100 a year. In November, 1769, they took possession, and began to work it in the April following. It is argued for defendant that the trustees had advanced no trust money, and there is no proof that they did, upon the subject. Supposing that true, and that Humble, by the original contract of 1766, was bound to communicate this to the trustees, a case might arise new in specie, and which may put the court to some difficulty, upon the supposition that the original trust did not warrant them to embark the trust estate; that they had entered into an agreement to do it, but did not actually apply the trust money. I think if a trustee, having engaged an infant's name in an adventure, yet, afraid of the double and unequal risk of answering in one case for all the profit and in the other for all the loss, does not embark the infant's property, it would be too unreasonable to make him answer only for using the infant's name. And now I speak against an express authority, and that a pretty strong one, the case of *Morton Eden*, which was called a case of a confederacy, and came first before Lord Bathurst, and was carried to the House of Lords, and, if I do

not much mistake it; goes that length of saying that he shall; but I can not agree to that. But here they engaged much more deeply; for though there was no previous duty to embark the infant's fortune, yet they did so, and it is exceedingly clear that such a trustee, having entered into such an agreement, can not get rid of it by selling to himself. But here he could not, even to another; because, though no part of the trust money was actually laid out, yet by the deed of 1766 the infant's estate was appropriated to this purpose. In the agreement of 1770 the infant's way-leaves, etc., are made subservient to this at an estimated price. There is in this case another article in which their affairs are blended together in such a manner as the court will not hear of—that is, the general agreement of the trade that no more than a limited quantity of coals should be raised from the infant's estate *nominatim*.

It is plain they dealt with the world as if for the infant's estate; and it is remarkable that what was allowed to be the produce for the two collieries should be just equal to what was before the produce of the Berkeley alone. The court will look with great jealousy on the conduct of trustees; and where a person has the arrangement and management of two estates, in one of which he is interested, personally, in the other as trustee, the court will not allow him to act for his own or for the infant's benefit as he pleases. This, therefore, according to the intention of the testator, according to the idea agreed upon as his intention between Humble and the defendant, according to the will, and in every point of view, is clearly to be considered as part of the estate of the infant, and therefore he is entitled to an account of the produce of the colliery, and is not to be turned over to a remedy against the trustee for the injury done to the trust estate. Supposing that so, he must also account for such profits as arose by conveying the coals in other keels than those of the testator; for the testator had a right to direct that his keels should be employed, and has done so. But it is said the release will stand in the way. Upon that head I refer to defendant's own evidence, by which it is proved that the plaintiff was a trustee for Smithson in several transactions; and not only that (which might be sufficient), but this assignment was the very thing talked of the last time they conversed with Smithson in the

prison. The subject of their conversation was the plaintiff's claim. And after Smithson had been for two years tampering with his uncle for a compromise, it went off on account of this assignment. But if that was not so, I think making this compromise with a man in gaol would be rather obnoxious; and it is not such a compromise as ought to stand. He must therefore account for a third of a moiety of the profits of the Topt-hill colliery, and for all the profits which might have been derived from the employment of Smithson's keels in conveying the coals from both collieries, making all just allowances, and all papers to be produced before the master. Reserve the consideration of interest and costs.

IRWIN ET AL. V. HARRIS ET AL.

(6 Ired. Eq. 215. Supreme Court of North Carolina, 1849.)

[1] **Collusive recovery against trustee.** The trustee of a mine can not be suffered to allow a collusive recovery in ejectment for the purpose of recovering a claim held by him against the mine. Such conduct is a breach of trust, and the plaintiff (who claimed adversely to the legal title held by the trustee) will be enjoined from suing out a writ of possession on his recovery.

Purchasers at sheriffs' sales. It is the policy of the law to favor purchasers at sheriffs' sales, as against debtors in the execution whose debts have been paid by the purchasers, but not as against third persons.

Appeal from an interlocutory order, made at the fall term 1847, of Mecklenburg Court of Equity, His Honor, Judge PEARSON, presiding.

This bill was filed by Joseph H. Wilson, James P. Henderson, John Irwin and William W. Elms against Henry Heathern, James Magnus, George D. Langstaff, John Penman, John B. S. Harris, Henry Blundell, Henry W. Olcott, Daniel Alexander, William H. Harris and John W. Morrison. The bill set forth that in the year 1835, an association called the Anglo-American Gold Mining Association, was formed by certain persons, most of whom resided out of this State, together

[1] *McNeil* v. *Gates*, 41 Ark. 264; *Dickinson* v. *Durfee*, 139 Mass. 232; *Oliver* v. *Piatt*, 3 How. 333, 407.

with the defendant Penman, a citizen of this State, the object of which was to purchase and work gold mines in North Carolina; that of this association the defendants Heathern, Blundell and Langstaff were members, besides other persons to the plaintiffs unknown; that the said Penman, in the year 1835, acting for the said association, purchased, among other property, a tract of land lying in Union county, known as the Washington Mine, and a smaller tract adjacent to it; that the said Penman, by deed of bargain and sale dated in March, 1836, conveyed the said lands to the defendants John B. S. Harris, Olcott and Alexander, in trust for the said association, empowering and directing the said trustees to convey to such person or persons as any three of the directors of the said association should designate. The bill further states that the association commenced its operations in the year 1835 or 1836, worked their mines extensively and contracted large debts on the faith of the property of which they were in the possession; that in the year 1837 they were largely indebted, and among others to the plaintiffs Irwin and Elms, in the amount of $14,000 or $15,000; that, for the purpose of securing the payment of this indebtedness, a deed of bargain and sale for the land above mentioned was regularly executed by the defendants Magnus, Heathern, and Blundell, three of the directors of the said association, to the plaintiffs Wilson and Henderson, as trustees, for the purpose of selling the same and discharging the debts enumerated in the deed, and authorizing and requiring the defendants J. B. S. Harris, Olcott and Alexander, trustees as aforesaid, to convey the said estate to the plaintiffs Wilson and Henderson, trustees as aforesaid, according to the provisions of the deed made by Penman to the first trustees; that the said plaintiffs, Wilson and Henderson, took possession of the said Washington Mine and sold the same to the plaintiffs Irwin and Elms, and executed to them a deed therefor. The bill further sets forth that the defendants Alexander, Olcott and J. B. S. Harris, trustees in the deed from Penman, instead of discharging their trust by making title to the said land to the plaintiffs Wilson and Henderson, have refused to do so, although they had notice of the claim of the said plaintiffs, and were often requested to make the conveyance; but that, on the contrary, the defendant J.

B. S. Harris, designing to defeat the just claims of the said plaintiffs to the land aforesaid, co-operated with the defendants Morrison and Harris, authorizing them to make use of his name in an action of ejectment to recover the possession of the said land. The bill further states that the plaintiffs Wilson and Alexander delivered the possession of the said land to the plaintiffs Irwin and Elms, after their purchase, and it has been held by them ever since. The bill further states that, in pursuance of the combination above mentioned, the said J. B. S. Harris, with the defendants Morrison and W. A. Harris, instituted in the year 1840 in the Superior Court of Mecklenburg County, an action of ejectment against the defendant John Irwin, in which they claimed title under two counts, one on the demise of W. A. Harris and Morrison, and one in the name of Olcott, J. B. S. Harris and Daniel Alexander, the trustees above named; that at the fall term, 1846, of the Mecklenburg Superior Court, the said W. A. Harris and Morrison obtained a verdict and judgment, and on appeal the judgment was affirmed in the Supreme Court, and that the said W. A. Harris and Morrison now threaten to sue out a writ of possession on the said judgment; that the claim of title set up by W. A. Harris and Morrison is through Penman, and subsequent to his conveyance to Olcott, Alexander and B. S. Harris, and also to the conveyance to the plaintiffs Irwin and Elms, by Wilson and Henderson. And the bill then prays for an injunction to restrain the issuing of a writ of possession on the said judgment in ejectment, for a conveyance of the legal title and for general relief.

The injunction prayed for was granted. At the return term, some of the defendants answered.

W. A. Harris and J. M. Morrison answered that they admit the action of ejectment instituted by them for the recovery of the land, and that they declared on two counts, one on the demise of themselves, and one on the demise of J. B. S. Harris, Olcott and Alexander; they say that the plaintiff Irwin caused himself to be made defendant in the place of the tenant in possession; that on the trial no evidence was offered of any title in the said J. B. S. Harris, Olcott and Alexander, and the recovery was effected on their own demise. They state that at February term, 1838, of Mecklenburg Superior Court

of Law, they recovered a judgment against the said Penman for about five hundred dollars; that on this judgment they issued a *fi. fa.*, which was levied on the land above mentioned, and at the sale by the sheriff these defendants became the purchasers, and received a deed from the sheriff. They admit the suing out of the writ of possession on their judgment in ejectment. These defendants then say, that inasmuch as they are purchasers at a sheriff's sale, they have a right to be placed in possession under their said recovery, whatever may be the claim of title on the part of the complainants. These defendants further state that no copy of the exhibits mentioned in the plaintiff's bill was annexed to the copy of the bill served on them, and they do not admit the allegations of the bill as to them to be true.

The defendant J. B. S. Harris, filed a separate answer. He admits that his name was used, by his express consent, in the action of ejectment before mentioned, as one of the lessors of the plaintiff. He states that the deed of trust executed by the said Penman to this defendant, Olcott and Alexander, was made at the instance of the defendant Olcott and others, at a time that the association, before referred to, was largely indebted to this defendant, and he believes, also to Alexander and Olcott; and this defendant believes that one great object of the said trust was to prevent Penman from squandering the said property, and thereby to enable said trustees to secure the debts due by the said association. This defendant further avers that the said association is still indebted to him, as executor of his father, and in his own right, to the amount of forty or fifty thousand dollars, and is also indebted to Alexander and Olcott in an amount not known to this defendant; and that it was for the purpose of securing the large debt due to him from the association that he permitted his name to be used in the action of ejectment above referred to; and he insists that if a recovery had been effected on the demise of himself and his co-trustees, they would have been entitled, both in law and equity, to have taken possession of the said land, and to have held the same, as a fund for the satisfaction of their debts; and he insists that if the legal title to the said land is still in him and his co-trustees, then they will, in equity, be entitled to hold said land as a fund applicable to the payment of their

debts. The defendant avers that no copy of the exhibits referred to in the plaintiffs' bill was attached to the copy of the bill served on him, and does not admit such exhibits. He insists that, even if a request had been made to him to part with his legal title, which he denies, he had a right to require the payment of his debt before he parted with such title.

Judgment *pro confesso*, by due course of the court, was taken against the other defendants.

Upon the coming in of the answers, a motion was made to dissolve the injunction, which was refused, and by leave of the court the defendants appealed.

OSBORNE, J. H. WILSON, BYNUM and IREDELL, for the plaintiffs.

BOYDEN, for the defendants.

PERSON, J.

The injunction ought to have been continued until the hearing.

The land in dispute was conveyed to one Penman, in 1835. Penman, in 1836, conveyed to J. B. S. Harris, Olcott and Alexander, three of the defendants, in trust for the Anglo-American Gold Mining Association, and such persons as the said association should appoint. In 1837, Henry Blundell and Henry Heathern and James Magnus, three of the directors of the said association, conveyed to Wilson and Henderson, two of the plaintiffs, in trust to sell for the payment of debts, and, in pursuance of the deed, directed the said trustees to hold in trust for the said Wilson and Henderson. Afterward the said Wilson and Henderson conveyed to Irwin and Elms, two of the plaintiffs, who took possession by their tenants.

In 1838 Morrison and William A. Harris, two of the defendants, caused the land to be sold by the sheriff, under an execution in their favor against Penman, became the purchasers, and took a deed from the sheriff.

In 1840, an action of ejectment was instituted against the tenant of Irwin and Elms. The declaration contained one count on the demise of Morrison and W. A. Harris, and a

second count on the demise of J. B. S. Harris, Olcott and Alexander, and a recovery was made upon the first count.

The prayer is for a conveyance of the legal title by the defendants, J. B. Harris, Olcott and Alexander, and that the defendants, W. A. Harris and Morrison, be enjoined from suing out a writ of possession.

The equity of the bill, so far as it relates to the injunction, is, that the recovery in the action of ejectment, upon the demise of W. A. Harris and Morrison, was effected by a combination between J. B. S. Harris, Olcott and Alexander, who are trustees for the plaintiffs, and W. A. Harris and Morrison, who claim adversely to them under the sheriff's deed, by which combination an undue advantage was gained for, although the defendant in that action could have defeated a recovery upon the demise of W. A. Harris and Morrison, who claimed under a sheriff's sale in 1838, by showing that he had conveyed to the trustees in 1835, yet, as there were two demises, this would necessarily have enabled the plaintiff to recover on the second demise, and thus the present plaintiffs were, in that action, exposed to a cross-fire. This is a plain equity confessed by the defendants.

J. B. S. Harris, the only one of the trustees who has answered, admits that he and Alexander consented tha their names should be used as lessors in the action of ejectment, which was also to contain a count in the name of W. A. Harris and Morrison, and says his reason for doing so was for the purpose of securing a large debt, which the association owed him, when he consented to accept the deed of trust, and which is still unpaid; and he insists that, had a recovery been effected on the demise in his name, and that of his co-trustees, he would have been entitled in law and equity to hold the land to secure the debt. He does not allege that the debt was mentioned in, or secured by the deed of trust, but admits that the legal title was received by him and his co-trustees in trust, to hold for the association, and for such persons as the directors of the said association might direct or appoint. It is a strange idea of equity for a trustee, because the legal title has been confided to him, to assert a trust in favor of himself. Equity will, under no circumstances, permit a trustee to attempt to secure a debt of his own, not secured by the trust,

by forming a combination with one claiming adversely to those whose interest he has undertaken to protect, because it is a palpable breach of trust and a direct violation of the confidence reposed in him.

The other two defendants, William A. Harris and Morrison, admit that they united with the trustee in bringing the action of ejectment, but they insist that as the recovery was effected upon the title which they set up, as purchasers at a sheriff's sale, and not upon the demise of the trustees, they ought to be allowed to take possession, especially as it is the policy of courts, both of law and equity, to favor purchasers at sheriff's sales.

It is the policy of the law to favor purchasers at sheriff's sales, as against debtors in the executions, whose debts have been paid by the purchasers, but not as against third persons; particularly where these have the equitable estate, and the purchasers have effected a recovery at law, by an iniquitous combination with the trustees, whose duty required them to give protection, instead of taking sides with their adversaries.

If these defendants had impeached the deed made by Penman to the trustees, upon the ground of an intent to defraud his creditors, it might probably have avoided them, at least upon the hearing, as the recovery would then have been effected upon the strength of their own title as purchasers, and not by force of the combination; but there is no allegation of the kind, and the bill avers that Penman purchased as the agent and with the funds of the association, the *cestuis que trust.* That they were the equitable owners, before the conveyance by Penman to the trustees, is not denied or called in question.

The objection that copies of the exhibits referred to in the bill were not annexed to the copies served, is not available on the motion now before us. It would have been a good reason for refusing to answer, but the exhibits are sent up with the transcript. The deeds are duly proven and registered, and the motion was heard in the court below upon the bill, answers and exhibits filed.

The third position taken by the defendants W. A. Harris and Morrison, that they should be allowed to take possession, because there is no allegation that the mine will be endangered, or that they are not fully able to pay the rents and

profits of the land and all the gold they may take from the mine, is also untenable. These allegations are not necessary against parties who have no title, (for in 1838 Penman had no interest in the land, either legal or equitable,) and who effected their recovery at law by inducing trustees to commit a breach of trust, and to form a combination against their *cestuis que trust.*

The interlocutory decree was right.

PER CURIAM: *Ordered to be certified accordingly.*

BARKSDALE ET AL. v. FINNEY ET AL.

(14 Grattan, 333. Court of Appeals of Virginia, 1858.)

[1] **Trust fund followed into company assets.** The president and acting manager of a mining company, being also trustee in a marriage settlement, sells the trust property in violation of his duty and purchases it for the corporation; the corporation, being made a party to a bill for accounting, the beneficiary, after having exhausted the decree against the principal, may then pursue it in the hands of the corporation, or have a decree for the price at which it was purchased.

[2] **All who participate in a breach of trust are jointly and severally liable,** and a purchaser concurring in a fraudulent breach of trust and actively participating in it and converting the property to his own use incurs a like liability with the fraudulent trustee.

Slave injured in mine returned by purchaser. A part of the property sold in violation of the trust, being slaves, were used in the mines and one of them was injured and was thereupon returned to the *cestuis que trust.* On a decree against the purchaser for the price at which he purchased the slaves, he should be credited for those returned at their value when returned.

Mining for coal is a dangerous occupation.

[3] **New company succeeding to liabilities.** H., who controlled all the stock of the B. corporation, contracted with third persons to obtain a charter for another corporation of which they were to be the corporators, and to transfer to the new corporation all the stock, and convey all the real estate and other property (except slaves) of B., as also some real estate of his own. The charter was obtained and the stock transferred; no conveyance of the real estate was made, but the new corporation took possession of it and claimed it as its own: *Held,* that the new corporation is the successor of B., and takes the property subject

[1] *First National Bank* v. *Bissell,* 11 M. R. 547.

[2] *Getty* v. *Devlin,* 7 M. R. 119.

[3] *St. Louis M. Co.* v. *Sandoval M. Co.,* 116 Ill. 170; *Wasatch Co.* v. *Jennings,* 15 Pac. 65.

to payments of the debts of the corporation of B., to the value of the property received.

[1] **Relation of stockholder to the corporation.** Where the stock of a corporation is declared to be personal estate and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders. The certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities.

Creditor's suit against successor to corporation. A creditor of a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone.

As early as 1827 a marriage settlement was executed, by which certain land in Powhatan county and the slaves and other property thereon, were settled on William Finney and Elizabeth C., his wife, and the children of the marriage. In January, 1837, Finney was dead, having left a widow and several children, and John Heth was the surviving trustee in the deed. On the 23d and 24th of January, John Heth sold at public auction the whole of the trust property; at which sale his brother, Beverly Heth, purchased the land in Powhatan and a number of the slaves, his whole purchase amounting to $25,103.06. John Heth purchased slaves amounting to $11,345. These slaves, the plaintiffs alleged, were purchased for the Black Heath Company of Colliers, a corporation of which John Heth was the president and acting manager. This corporation had been created in 1833, and at its creation Beverly Randolph, John Heth and Beverly Heth were the owners of the property which constituted its capital stock. The number of shares were three thousand, of nearly all of which, in 1840, John Heth was the possessor or had the control.

In 1840 John Heth entered into a contract with persons living in England, by which he undertook to procure a charter for a new company, to be called "The Chesterfield Coal and Iron Mining Company," with certain provisions which would enable them to conduct the business in England, and to transfer to the new company all the property of the Black Heath Company (except their slaves and some lands specified), and

[1] *Mason* v. *Pewabic M. Co.*, 25 Fed. 882.

all the shares of stock in that company, for which they were to pay him a certain sum of money, and a royalty of one shilling and three pence (reduced afterward to one shilling) upon every ton of coal raised by the company. This agreement was carried out, with some modifications, and in 1841 the Chesterfield Coal and Iron Mining Company was organized, and the shares of the stock in the Black Heath Company were transferred on their books to the Chesterfield Coal and Iron Mining Company; but there does not appear to have been any conveyance of the real estate from the one company to the other. In 1840 Mrs. Finney, for herself and infant children, filed her bill in the Circuit Court of Powhatan County, against John Heth and others, seeking an account of the trust property. In March, 1841, there was a decree directing John Heth to account for the whole purchase money of the trust fund, which, upon a settlement of the account, it appeared amounted to $40,755.11, after crediting him with his disbursements and the amount of the purchases made by Mrs. Finney. This decree was unproductive, Heth having become insolvent.

In 1842, after the death of John Heth, the plaintiffs filed a supplemental bill, making Beverly Heth, the two corporations hereinbefore mentioned, and others, parties, seeking to recover from Beverly Heth and those claiming under him, the trust property he had purchased, and seeking to subject the Chesterfield Coal and Iron Mining Company for the price of the slaves alleged to have been purchased by John Heth for the Black Heath Company, on the ground that the Chesterfield Company took the property of the Black Heath Company, with the burden of paying the debts of the latter. The pleadings and proceedings in the case are stated by Judge Allen in his opinion.

There having been a decree for the plaintiffs against Beverly Heth, or his trustees, for the trust property in his possession, and against the Chesterfield Coal and Iron Mining Company for the amount due upon the slaves purchased by Heth for the Black Heath Company, William J. Barksdale and four others, who were judgment creditors of John Heth, on which judgments he had taken the oath of an insolvent debtor, filed their petition asking to be made parties in the cause, and claiming that they were entitled to have the royalty which the company had contracted to pay to John Heth subjected to

satisfy their debt in preference to the claim of the plaintiffs; but the court rejected their petition, and thereupon they and the Chesterfield Coal and Iron Mining Company applied to this court for an appeal, which was allowed.

LYONS and MCFARLAND, for Barksdale, etc.

C. ROBINSON, for the Chesterfield Company.

P. ROBERTS and MORSON, for the appellees.

ALLEN, Pres. J.

The decree from which this appeal has been taken, subjected the Chesterfield Coal and Iron Mining Company to a heavy recovery on account of a debt alleged to be due to the appellees from the Black Heath Company of Colliers. The first question, therefore, which arises upon the record, and which is presented by the first assignment of errors, relates to the existence of this debt. Was the latter company at any time liable to the appellees for this debt, and if so liable, has that liability been discharged by the acts of the appellees?

On the 16th of December, 1840, the widow of William Finney, in her own right, and as the next friend of her infant children, filed their bill against John Heth, Beverly Heth and the Black Heath Company of Colliers, setting forth their claims as *cestuis que trust* under a deed of marriage settlement and other deeds touching the trust property, under which John Heth had become sole surviving trustee; and complaining of a sale made by John Heth in January, 1837, of the whole trust property, which they pledged in the bill was made by John Heth without authority, and directly against the plain provisions of the deeds under which he was acting as trustee, and were a clear and distinct breach of trust committed by him, and by all who participated with him in the sale; and that, at the sale of the trust property made by John Heth as trustee, he, as the manager of the business of the Black Heath Company of Colliers, purchased for the company slaves, and perhaps other property, to the amount of eleven thousand three hundred and forty-five dollars. The bill further averred that at the said sale Beverly Heth purchased land and slaves to the amount of twenty-five thousand one hundred and three dollars and six

cents. It made John Heth, Beverly Heth and the Black Heath Company of Colliers defendants, and prayed for a decree that said purchasers should pay the principal and interest due from them respectively, and that John Heth should pay any balance appearing to be due from him, and for general relief.

To this bill John Heth filed his answer, admitting the sales of the trust property as stated in the bill; thereby admitting the purchase of the slaves by himself, as manager of the Black Heath Company, at the sale made by him as trustee, at the price charged. And in regard to that purchase he states in his answer, that the sufficiency of the securities of the debt due from the Black Heath Company for the purchase money of the slaves is undoubted, as until it is paid to this respondent the best property of that company is bound for it. What the securities for the debt were, he does not state; if any bond was given, it was not exhibited. The record shows that prior to this period he claimed to own or control almost all the stock of the company, and that he had actually made a transfer, by his deed of the 29th day of April, 1840, to Stevenson and Brockenbrough, as trustees, of two thousand six hundred and eighteen shares of said company, the deed reciting that the remaining three hundred and eighty-two shares were vested in other persons, but were intended to be purchased or got in by him. The answer was sworn to on the 14th of January, 1841, and filed on the 6th of March thereafter.

On the 30th of March, 1841, an interlocutory decree was rendered, which recites "that the cause came on to be heard upon the bill, the answer of the defendant John Heth, with the replication thereto, the bill taken for confessed against the other defendants, more than two months having elapsed since the filing of the plaintiffs' bill and the return of the subpœnas with service acknowledged by the other defendants, and they still failing to appear and answer, and sundry exhibits." The decree then directs accounts to be taken in relation to the trust estate, and amongst them an account showing the exact amount due from the Black Heath Company and from Beverly Heth to John Heth as trustee, or to the trust fund. The commissioner, in the report made out in obedience to this decree, states that John Farrar attended and filed the accounts of John Heth as trustee, with the vouchers, from which the commis-

sioner stated the accounts returned by him. John Farrar was afterward made a defendant by an amended bill, as clerk and agent of said company, and in his answer admits he was such clerk and agent, and that as such, the books and papers of the company were kept by him and still remained in his possession. In the account returned by the commissioner the trustee was charged as of the 24th of January, 1837, with eleven thousand three hundred and forty-five dollars, amount of articles purchased by the Black Heath Company. No accounts were taken at this time with any parties except with the trustee, and in the account so taken the trustee was charged with the whole amount of the sales of the trust property; and there being no exception the amount was confirmed, and on the 27th of October, 1841, an interlocutory decree was rendered against John Heth for the whole amount of the trust fund unaccounted for. The decree directed the commissioner, if required by the plaintiffs, to execute those parts of the decretal order directing the accounts, which had not been executed; and then proceeds to declare that liberty is hereby reserved to the plaintiffs to resort to this court for any further decree against the defendants, or any of them, and as to any of the subjects mentioned in the plaintiffs' bill in this suit to which they may show themselves entitled, in the event this decree shall prove unavailing in the whole or in any part; and liberty was given to them to amend their bill and make new parties.

On this decree an execution was issued against John Heth; the sum of four hundred and thirteen dollars and thirty-six cents made as of the 7th of February, 1841; and a return of no effects found to make the balance.

Having thus made an unsuccessful effort to collect the amount of the trust fund from the trustee, and shown by the official return of the proper officer that the decree against him had proved unavailing for nearly the whole amount decreed, the appellees, under the leave reserved to them in the said decree to resort to the court for any further decree against the defendants, or any of them, and as to any of the subjects mentioned in the suit, filed their amended and supplemental bill on the 11th of February, 1842, in which they make new parties, amongst them the Chesterfield Coal and

Iron Mining Company, a new company incorporated by an act of Assembly passed the 15th December, 1840: Sess. Acts of 1840–1, p. 148; and allege in their bill, amongst other things, that John Heth, untruly pretending that he was the owner of the whole stock of the Black Heath Company, had made some contract with the Chesterfield Coal and Iron Mining Company, by which the whole property of the Black Heath Company, except slaves, had been taken possession of by the Chesterfield Company, by their agents in this country; and that the stockholders of the latter company were all aliens, and with the exception of one of the agents, non-residents. They further state, that if John Heth had ever executed a deed conveying the property or stock of the Black Heath Company to the members of the Chesterfield Company, it had never been recorded in the County Court of Chesterfield County, the county where the property was situated. And the bill contains the further and more material averment bearing on one of the questions arising in this controversy, that the property being corporate property, even if John Heth had been the owner of all the stock, he had no legal power or authority to convey, as an individual, the corporate property exempt from the payment of the debts of the company. The bill furthermore, as to this branch of the case, alleges a sale by John Heth of some of the slaves purchased by the Black Heath Company, and seeks to charge them in the hands of the purchasers or incumbrancers; and prays that the debt due from the Black Heath Company be satisfied out of the proceeds of said slaves, or out of the other property of the Black Heath Company in the possession of the Chesterfield Company, and under the control of their agents, who are made defendants.

The bill also details the circumstances attending the sale of the land and other trust property to Beverly Heth; alleges a conveyance by Beverly Heth of the land and slaves pending the suit, to a trustee to secure certain creditors, and prays that the property be re-conveyed to the appellees, or sold, and the proceeds applied to the payment of the debt due to them from John Heth.

On the first of November, 1842, the cause again came on to be heard on that branch of the case affecting Beverly Heth's purchases, and the court decreed that John Heth committed a

breach of trust in the sale of the trust property to Beverly Heth, in which the latter actively concurred; that the other defendants claiming under him were *pendente lite* purchasers, and they, with their vendor, should be regarded as trustees of the property for the appellees, and directed a re-conveyance thereof to a trustee for their use. And an inquiry was directed to ascertain what portion of the property held by the trustees of Beverly Heth was the property sold to him by John Heth as trust property; and an account of hires of the personal property, and of rents, profits and permanent improvements was directed.

From this decree an appeal was taken to this court by two of the creditors of Beverly Heth. This appeal brought up the whole case for revision. The correctness of the decree of the 27th of October, 1841, against John Heth, for the whole amount of the trust fund, reserving liberty to pursue the purchasers if the decree against the trustee was unavailing, as well as the propriety of the decree of November 1, 1842, setting aside the sale of the land and directing a re-conveyance of the land and such of the slaves as upon inquiry should be ascertained to have been part of the trust fund, were open for consideration.

It was assigned as one of the errors committed in the cause, that to repudiate the sales made by the trustee was incompatible with the course pursued, as the appellees had sought to enforce them by every means in their power; had taken a decree against the trustee for the balance due, and in part enforced it. On the 12th of May, 1845, this court affirmed the decree.

After this affirmance further proceedings took place in the court below in relation to the branch of the case now under consideration, and a report was made by the commissioner ascertaining the amount of the debt due from the Black Heath Company on account of the slaves purchased at the sale of the trust property. In this account the company receives credit for several sums paid as interest by the company on this debt, and the deposition of John Farrar proves that those charges against the appellees were taken from the books of the company. He also furnishes a list of the slaves purchased for the company, and their prices; and in his answer to the

amended bill he states that a short time after the trust sale the president of the company directed him, as clerk, to charge against the company, on its books, a note given to John Heth for the amount of the company's purchase at the sale of the trust estate, which entry he made in the presence of the president.

From this reference to the pleadings and proofs in the cause, there can be no question as to the existence of the debt at one time. It is charged in the original bill, and that bill was taken as for confessed against the Black Heath Company. This of itself concludes the company, but the report of the commissioner charges John Heth with the debt, and to that report there was no exception. And the clerk and agent of the company proves that the debt was entered on the books of the company as a charge against it, and credits entered for the interest paid.

The original existence of the debt does not appear to have been seriously controverted, and accordingly, in the special statement made out at the instance of the Chesterfield Company, the Black Heath Company is charged with the amount given for the property purchased at the trust sale.

But it is argued that the appellees have elected to disaffirm the sale and pursue the property; that the purchase was merely void, and the slaves remained their property. It is true that John Heth, having been the agent for the Black Heath Company in making the purchase, as well as the trustee who sold, the company could not deny notice, nor have they done so. That it was a gross violation of duty and breach of trust in the trustee to turn over the trust property to the company of which he was principal stockholder and the manager, without securing and investing the price, has not been controverted; and the *cestuis que trust* had a right to set aside the sale and follow the property, if it could be traced, in the hands of the company or any others claiming it, with notice of the breach of trust.

The question raised by this objection has already been adjudicated in this cause. Although the court gave a personal decree against the trustee for the whole amount for which he sold the trust property, it affirmed the right of the appellees to pursue the purchasers as to any of the subjects mentioned

in the bill, if the decree against the trustee proved unavailing; and the construction put upon this reservation is shown by the decree on the amended bill, which set aside the sale of the land and such of the slaves as were purchased by Beverly Heth, so far as they could be traced in the hands of purchasers with notice, the court thus holding that a personal decree against the trustee for the price did not preclude a resort to the property itself in the hands of the wrong-doer participating in the breach of the trust, or in the hands of those who had notice of the fraud. And if the property can be so pursued, the reason applies with equal force to the party himself.

All who participate in a breach of trust are jointly and severally liable. A purchaser concurring in a fraudulent breach of trust, and, as in this case, actively participating in it, and converting the property to his own use, incurs the like liability with the fraudulent trustee: *Pinckard* v. *Woods*, 8 Gratt. 140; *Atty. Gen.* v. *Leicester*, 7 Beav. 176; Hill on Trustees, 520, *n.* The relief afforded in equity in such cases is two-fold —retrospective, in order to remedy the mischief done; and prospective, to prevent further injury: Hill on Trustees, 521. The court endeavors, in the first place, to replace the parties in the same situation they would have been in if no breach of trust had been committed. And, therefore, where the trust property improperly disposed of can be followed in *specie*, as where it consists of real estate, it will compel the trustee or party in possession, if the latter have taken with notice of the trust, to reconvey the estate to the purposes of the trust: Hill on Trustees, 522.

And where trust moneys are followed into land, the *cestui que trust* may either take the land for the whole, or may have a decree for a sale; and if there be a deficiency, then prove on the estate of the trustee: Hill, 522, *n.* 1. It is true that where property has been improperly sold by a trustee the *cestui que trust* can not claim both price and property, for that would be to get a double satisfaction; but he is entitled to one or the other, and it does not lie in the mouth of the fraudulent participator in the breach of trust to say that the sale was void and so no debt was due, for this would be setting up his own wrong to protect himself. Nor can the decree of the court replacing the parties in the same situation they would

have been in if no breach of trust had been committed by restoring the property, where it can be restored, be held to release the party from all personal responsibility for the residue which the purchaser has converted to his own use.

In this case, as all were before the court, and jointly and severally liable, the decree against the trustee was for their benefit; for if the fund could have been collected and invested according to the stipulations of the deed of trust, they would have been relieved, as it was not alleged that the prices bid for the property were too low; and the trustee was empowered, from time to time, to vest any part of the property in real estate or other property. The breach of trust resulted from his failure to collect the price, and in permitting the purchasers to take and convert the trust property to their own purposes without paying for it or giving any adequate security for the money. It was therefore proper, in every aspect of the case, that an effort should be made to collect the amount from the trustee before resorting either to the property or the purchasers.

If these views, as to the effect of the decree in this case, or of the law as applicable to the facts of the cause, are correct, the court did not err in holding that the existence of the debt due to the appellees by the Black Heath Company was proved, and that they had not lost their right to proceed against the company for payment; and, therefore, the first exception taken by the Chesterfield Coal and Iron Mining Company to the report of Commissioner Shore, made under the decree of the 28th of October, 1848, was properly overruled.

The second and third exceptions were sustained and the credits allowed. The prices of the two slaves surrendered to the appellees voluntarily by R. Gwathmey and Lewis Rogers have been applied to the principal of the debt, the most favorable mode of applying the credit for the appellants. And having had the use of the slaves in a dangerous occupation, whereby one is proved to have been badly injured, a credit for their value, as at the time they were returned, is as much as they could claim.

Nor is there any just pretension for a claim to a credit for the whole amount of Beverly Heth's purchases. They amounted to twenty-five thousand one hundred and three

dollars and six cents. The price of the land was fifteen thousand dollars, leaving upward of ten thousand dollars for slaves and other property. Of the slaves, it would seem six were recovered. For the land which was decreed to be restored and the price of the slaves John Heth would be entitled to a credit; but it is manifest the six slaves restored did not sell for the ten thousand dollars, and that sum, with the interest, would far exceed the value of the slaves returned, leaving Beverly Heth largely indebted to the trust fund. The assumption that a credit should be given for the whole amount of Beverly Heth's purchases, because by pursuing the property the sale must be considered as disaffirmed and the appellees be restricted to the property alone, has already been adverted to. So far as the trust property could be reached, they were entitled to pursue it without thereby losing their remedy against the fraudulent alienee for the price of so much as was converted to his own use, and could not be restored in specie. Nor does the failure of the appellees to pursue the property in the hands of other purchasers or claimants furnish any ground of complaint to their immediate debtor, the Black Heath Company. Being directly responsible as participating in the breach of trust, the appellees have a right to look to the company for payment, as one of the original wrong-doers; and the company can not insist on their creditor being sent on a doubtful and perhaps ineffectual pursuit of the property in the hands of those who, but for the intervention of the company, would not have acquired the possession of it.

If, then, the Black Heath Company was alone sued, the appellees would have a right to a recovery against it for the amount of their claim, as ascertained by the decree, and to satisfaction out of the corporate property. And it remains to inquire whether, under the facts appearing in this record, they can charge this debt on the Chesterfield Coal and Iron Mining Company, either as holding the property of the Black Heath Company, or as its successor, liable for its debts at least to the extent of the property received from it.

The Black Heath Company of Colliers was incorporated by an act passed February 20, 1833. The preamble, after reciting that B. Randolph, John Heth and Beverly Heth represented to the General Assembly that they were owners of cer-

tain lands in Chesterfield county, on which there are valuable mines of coal, of a coal yard, and certain personal property, consisting of slaves, etc., and that they were desirous of carrying on their business under the management of a corporate body, proceeded to enact that the capital stock, consisting of the real and personal property aforesaid, should be divided into three thousand shares, and that as soon as one thousand five hundred shares shall have been sold on the joint account of the proprietors, and by them duly conveyed by deeds recorded in said county, then that the title that the three proprietors had on the capital stock should be vested in them and the purchasers in proportion to the shares respectively held by them, and that the stockholders, their heirs and assigns, should be a body politic and corporate by the name, etc., with the usual corporate powers. And it was further provided that the stock should be real estate, and as such pass by descent, devise and sale. By an act passed January 10, 1837 Sess. Acts, 202; so much of the act before mentioned as declared the stock to be real estate, was repealed, and in lieu thereof it was enacted that it should be deemed personal estate, to be transferred, and certificates thereof issued in such manner as the president and directors or stockholders in general meeting should prescribe, with a proviso that nothing in the act should be so construed as to prevent the company from selling and conveying any part of such real estate as they may hold, and which had been incorporated into stock, and thereby declared personal estate; or to authorize the conveyance of such real estate, when sold or disposed of, in any other manner than that prescribed by the laws of the commonwealth for the conveyance or disposal of real estate; and when so sold and conveyed, from being considered as real estate. These two acts constituted the charter of the Black Heath Company, when the transactions between John Heth and the parties afterward incorporated in the name of the Chesterfield Coal and Iron Mining Company, took place.

On the 29th of April, 1840, a deed was executed between John Heth of the first part, Stevenson and Brockenbrough of the second part, and various individuals residing in England, of the third part; which, after reciting the charter of the Black Heath Company as aforesaid, describing its landed prop-

erty, reciting that two thousand six hundred and eighteen shares of the stock were then vested in John Heth, and that he intended to get the remaining outstanding shares vested in other persons, and describing various other portions of real estate belonging to Heth, or over which he had the control, proceeds to recite that said John Heth had proposed to the parties of the third part to form a company with them, to carry on the business of coal and iron mining, and to vest or to cause and procure to be vested in such company the fee simple and inheritance in possession, free from all incumbrance of the real or landed property of the Black Heath Company, and the other lands described; and that the said parties of the third part had agreed with John Heth to join in forming such company, and that they should purchase said property which John Heth had so proposed to vest in them, in case the authority of the General Assembly could be obtained in the manner described. The deed then, for the consideration therein mentioned, sets forth that John Heth had that day transferred the two thousand six hundred and eighteen shares of said Black Heath Company to the parties of the second part, on the books kept for the transfer of such shares; and had also conveyed the other land owned by said Heth to said parties of the second part, upon the various trusts set forth.

On the 15th of December, 1840, Sess. Acts, 148, an act was passed to incorporate the Chesterfield Coal and Iron Mining Company, as provided for in the deed before referred to, and an agreement of the same date with the deed between John Heth and the parties of the third part, named in said deed. By this act the company thereby incorporated was invested with full power and authority in their corporate capacity to take and receive valid conveyances and transfers of all the property and stock owned or occupied by the Black Heath Company, setting forth that the said stock consisted of three thousand shares, and describing the lands of the company. The act also authorized and empowered the company to receive conveyances of and to hold the other property named in the deed of John Heth before referred to.

After the passage of this act another deed, dated the 3d of August, 1841, was entered into between John Heth and the

persons constituting the company, by which certain differences between them were compromised, the terms of the agreement and the deed to Stevenson and Brockenbrough somewhat modified, and provision made for the indemnity of the Chesterfield Coal and Iron Mining Company against incumbrances and defects of title in the property agreed to be conveyed by John Heth. This deed, however, makes no specific conveyance of any of the property.

In the answer put in by A. F. D. Gifford, he states he is the sole general agent of the Chesterfield Company, and he exhibits the deed, the articles of agreement, and the articles of agreement and compromise before mentioned, to show how the company acquired their property. He avers, that as such agent he holds certain conveyances of real estate, all recorded in Chesterfield county, intended in part to carry into effect the contracts made with said John Heth, and which it is not deemed material to the purposes of this suit to file or describe particularly. The answer further alleges, that all the stock of the Black Heath Company was regularly transferred to John Heth, and by him conveyed to Stevenson and Brockenbrough, the trustees of the company, and afterward transferred upon the books of the Black Heath Company to the Chesterfield Company.

There does not appear in any part of the record, a conveyance of any real property by the Black Heath Company of Colliers to the Chesterfield Coal and Iron Mining Company. The amended bill averred that John Heth, as an individual, had no legal power or authority to convey the corporate property, exempt from the debts of the company.

The proviso of the act of January 10, 1837, making the stock personal estate, whilst it authorized the sale and conveyance of real estate theretofore created into stock, declared the law should not be construed to authorize the conveyance of such real estate in any other manner than that prescribed by law for the conveyance or disposition of real estate. Such conveyance must be by deed duly executed in the name of the corporation by its duly authorized agent. In the absence of any such conveyance, the property still belongs to such company or its successor, the transferee of the stock.

Under this aspect of the case, it is unnecessary to consider

many of the propositions so elaborately discussed at the bar, such as that the right of a corporation to dispose of and convey its real estate is commensurate with that of an individual; that although creditors may subject the corporate property, this right does not give a lien so as to attach to the property in the hands of the *bona fide* purchaser.

And although creditors may follow the assets in the hands of corporators who have sold out the whole corporate property and fraudulently appropriated the proceeds, yet such fraudulent appropriation would not affect the *bona fide* purchaser.

These propositions may all be sound, but they do not affect the present case.

If the appellees had procured a judgment or decree against the Black Heath Company of Colliers *eo nomine*, and issued their execution, what would have prevented a levy on the real estate of the company? once vested in the company, it could be divested only by a conveyance executed by the company A transfer of all the stock by the old to new stockholders would not destroy the relation in which creditors stood to the company and its property.

A share in a joint stock company is not, strictly speaking, a chattel, but bears a greater resemblance to a chose in action. "If (says C. J. Shaw) a share in a bank is not a chose in action, it is in the nature of a chose in action, and what is more to the purpose, it is personal property." By bank stock, say the Supreme Court of Tennessee, is meant individual interest in the dividends as declared, and a right to a distribution *pro rata* of the effects at the expiration of the charter: Angell & Ames, Corp., § 560, where the cases are cited.

A corporation may be seized of real property, as well as be possessed of personal property, but, as has been said by Lord Abinger, "The interest of each individual shareholder is a share of the net produce of both when brought into one fund." *Bradley* v. *Holdsworth*, 3 M. & W. 422. And in *Humble* v. *Mitchell*, 11 Ad. & El. 205, it was held that shares in a joint stock company such as this, are mere choses in action, incapable of delivery, and not within the scope of the Statute of Frauds requiring certain contracts for the sale of goods, wares and merchandise, to be in writing. It would

seem, therefore, to be clear law, that where, as in this case, the stock is declared to be personal estate, and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders; that the certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities. The transferee occupies the place—sits in the seat of his predecessor.

It has been argued that the agreement of the parties contemplated and provided for a purchase of the property which John Heth proposed to vest in them, and that the law incorporating the Chesterfield Company invested it with the power and authority, in its corporate capacity, to take and receive valid conveyances and transfers of all the property and stock of the Black Heath Company. It may be remarked that the deeds referred to make no provision, in express terms, for a conveyance by the Black Heath Company, and the law, while it authorizes a conveyance, also provides for a transfer of the stock. If a mere vesting of the property was all the law contemplated, there would have been no use in a transfer of the stock. By providing for both, the authority was given to step into the place of the corporation so merged in the one newly created; and the new corporation, by accepting the transfer of the entire stock, have thereby, under the authority given by their charter, placed themselves in the position of successors to the former corporation, liable to the extent of the property received, to the debts, and entitled to all the rights of the former corporation. They have so construed their authority under the charter, by taking possession of and holding the property of the Black Heath Company, as transferees of the stock, since the time limited for the expiration of the charter of the Black Heath Company.

It was decided in *Rider* v. *Union Factory*, 7 Leigh, 154, that, as a corporation without express provision of law could never hold property, and can only hold it for so long a time as the charter permits, that after the expiration of its charter it can hold no property, and therefore a judgment against it

would be fruitless; and 1 Lev. 237, is cited to show that by the principles of the common law, debts of a corporation, either to it or from it, are extinguished by its dissolution. This decision was in 1836. And afterward, and no doubt in consequence of the suggestion contained in the opinion in that case, the act of February 13, 1837, now incorporated in the code, was passed. That act prescribed general regulations for the incorporation of manufacturing and mining companies which might thereafter be incorporated, and provided that when such corporation should be dissolved by lapse of time or other cause, the corporate name, with the right to sue and be sued, should continue for the purpose of collecting and paying debts and the distribution of its property.

As this law in terms was limited to joint stock companies thereafter incorporated, a grave question might arise as to the right of the Chesterfield Company to hold any of the property of the Black Heath Company, since the time limited for its existence has expired, if the argument of the appellants and their construction of the agreements of the parties and the charter of the Chesterfield Company be correct. The property was vested in the Black Heath Company. The law expressly provided for the mode of conveying such property, and no such conveyance is shown. The legal title must therefore have continued in the Black Heath Company until its existence, as limited by the charter, expired. No such difficulty arises by giving the act incorporating the Chesterfield Company the construction contended for by the appellees, as authorizing the latter company, by accepting a transfer of the stock, to take the place of the former company, to incorporate the former company with itself, and as its successors, to hold its property, with all its rights, and subject to all its liabilities under the new charter.

This, it seems to me, is the true construction to be given to the acts of these parties and the charters referred to. It conforms with the understanding of the parties as manifested by their acts. John Heth, in his answer to the original bill filed after the deed to Stevenson and Brockenbrough, the trustees of these parties, and after the passage of the law incorporating the Chesterfield Coal and Iron Mining Company, states that the sufficiency of the security for the debt due from the Black

Heath Company for the purchase of slaves, was undoubted, as, until it was paid, the best property of that company was bound for it. And the Chesterfield Company, by taking a transfer of stock as their evidence of right, and providing for their indemnity by retaining a lien on the royalty to be paid to John Heth, and stipulating for a bond in the penalty of one hundred thousand dollars on the payment of the balance of the purchase money, with condition to indemnify them for any defects of title, etc., showed that they were not looking to any conveyance by the Black Heath Company in its corporate capacity, but that they were looking to John Heth, as the holder of the stock, to a substitution to his rights as such stockholder, and to an indemnity to be provided by him personally, against defects of title. I think the appellees have, under the facts disclosed by the record, a right to charge their debt on the property of the Black Heath Company in the hands of the Chesterfield Company as the successors of the first company.

Nor do I think the appellees were under any obligation to convene all the creditors of the Black Heath Company. They were asserting their individual claim against their personal debtor. It is not a creditor's bill calling for a distribution of the assets of an insolvent corporation amongst all entitled to participate. They occupy the position of any other creditor of a corporation seeking satisfaction by judgment and execution against their debtor. The corporate property can alone be charged, and there would be as much reason to require every creditor, the nature of whose claim compels a resort to equity, to convene all the creditors, as to exact it from these appellees. They have established their debt, and shown that the property held is much more than sufficient to pay it.

But an order was made to convene the creditors. If they failed to appear before the commissioner and prove their debts, the appellees were not in fault.

After the decree establishing the right of the appellees, a petition was offered by William J. Barksdale and others, asking, for the reasons set forth in the petition, that the appellees should be required to amend their bill and make them defendants. The motion was overruled, and they have united in the petition for an appeal; and the refusal of the court to require them to be made parties is assigned as error. The

parties have not brought before this court the record of *Barksdale* v. *Heth*, referred to in the petition, but that, perhaps, would not vary the case. The motion of these petitioners seems to be of a somewhat anomalous character. The appellees have proceeded against the Black Heath Company, and the Chesterfield Company, as its successor, to establish a personal debt; and after a decree in their favor, third persons, strangers to the proceeding, and who do not claim to be creditors, even, of either company, insist upon being made parties, upon the ground, in substance, that they are creditors of John Heth, who, as they allege, was a creditor of the Chesterfield Company, for certain royalties, etc. That if the Chesterfield Company is compelled to pay this debt to the appellees, they may insist on deducting the amount so applied from the sum they would otherwise be liable for to John Heth, and so the ability of John Heth to pay the petitioners would be diminished to that extent.

For the same reason, every creditor might insist on his right to intervene between any other creditor and the common debtor. For a recovery and satisfaction of the debt due to one creditor would diminish the means of the common debtor.

This application seeks to carry the doctrine a step further. For this company is not the common debtor. These petitioners are creditors of John Heth, and seek to intervene between the appellees and their personal debtor, because the latter, in the event of being compelled to pay, may seek indemnity from John Heth, by applying his funds in the hands of the company to this purpose. With this question the appellees have no concern. Whether their debtor is or is not a debtor of Heth, and whether the latter is bound to indemnify the company on account of this recovery, does not affect them. The right of the company to such indemnity, and to apply the royalty, or any other funds of John Heth under the control of the company, to that purpose, must be litigated between the company and John Heth, and those claiming under him. The appellees have shown that the company is their personal debtor, and has effects sufficient to pay the debt; and it would be most oppressive on them to be required to renew the contest with every stranger whose claims against others

may be remotely and in same collateral way affected by such recovery.

I think the decree should be affirmed.

The other judges concurred in the opinion of Allen, P.

Decree affirmed.

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[1] BAYLES ET AL. v. BAXTER.

(22 California, 575. Supreme Court, 1863.)

[2] **Resulting trust.** Where one person pays the consideration and the conveyance is made to another, the latter holds the title in trust for the party who has paid the consideration.

[3] **Verbal agreement to reduce to writing.** The fact that the party receiving a conveyance of land verbally agreed at the time, with the person paying the consideration, that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust *express* as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the Statute of Frauds.

Idem—The Statute of Frauds does not apply to a trust which is raised as a legal result from the facts.

A resulting trust may be defeated, as well as established, by parol evidence.

Appeal from the Seventeenth Judicial District.

The court below found the facts as follows: In a conversation about the 10th day of August, A. D. 1861, between the plaintiffs and defendant, both being at the time owners in the mining claims and property of the Highland Masonic Mining Co., at Wet Ravine, in Sierra county, defendant stated to plaintiffs that he had made arrangements to buy an interest in the company from one John Thomas, but would not do so unless the plaintiffs would also purchase an interest, so that they might have a majority of interests in the company, in order that the mining claims of the company might be worked

[1] Followed: *Sandfoss* v. *Jones*, 35 Cal. 487; *Price* v. *Reeves*, 38 Cal. 460. Cited, *Millard* v. *Hathaway*, 27 Cal. 129.

[2] *Bragg* v. *Geddes*, 5 M. R. 625; *Mershon* v. *Duer*, 40 N. J. Eq. 333; *Springer* v. *Springer*, 114 Ill. 550.

[3] *Hall* v. *Linn*, 8 Colo. 264.

and managed in accordance with the views and wishes of plaintiffs and defendant. Whereupon the plaintiffs stated their readiness to purchase an interest for the purposes named, and requested defendant to ascertain what interest they could purchase. It was agreed that plaintiffs should furnish the money, that the defendant shou'd buy the claim for them, but should act as if purchasing for himself, as it was supposed that he could buy it cheaper than plaintiffs, they having been active in some dispute or trouble in the company as to the manner of working the claims; that he should take a deed in his own name, and hold the interest until the October meeting of the company, and at that meeting should attend and vote with them (*i. e.* as they wished), and should at any time after said meeting, when it might be demanded of him, make a transfer or conveyance of the interest to them. A few days afterward defendant informed plaintiffs that he had arranged to buy an interest, one undivided thirty-second of the mining claims and property of the said Highland and Masonic Co., of John Cowen, for the sum of $1,600; to which sum plaintiffs assented, and handed defendant fifty dollars, which he said was wanted to "bind the bargain," he informing them that they could have a few days' time to raise the balance of the purchase money, and they agreeing to raise it.

On the 17th day of August, A. D. 1861, the plaintiffs, at Wet Ravine, gave defendant the balance and ten dollars over (in all $1,610)—$1,600 to be paid to John Cowen for his interest, and ten dollars for expense of deed and defendant's incidental expenses to Forest City, where the said Cowen was, to complete the purchase. The purchase was to be made, according to previous understanding of the parties, for plaintiffs, but in the name of defendant. On the day last named, defendant purchased the interest from John Cowen, which is designated as share or interest No. 3, consisting of an undivided thirty-second of the mining claims, etc., as aforesaid, paying therefor $1,600 of the money obtained from plaintiffs, and taking a deed in his own name. Since the month of October, 1861, plaintiffs have demanded of defendant a deed of the premises, with which demand he has failed to comply.

VANCLIEF & BOWERS, for appellant.

SEARLS & NILES, for respondent.

CROCKER, J., delivered the opinion of the court, COPE, C. J., concurring.

This is an action to compel the defendant to convey to the plaintiffs the undivided one thirty-second part of the mining claims and property of the Highland and Masonic Mining Company. The findings of the court show, that on the 17th day of August, 1861, the plaintiffs furnished the defendant $1,610, to purchase said interest and pay the incidental expenses of the purchase, with the agreement that he was to make the purchase and take the conveyance of the property in his own name, and hold it until the October meeting of the company, which he was to attend, and vote this interest as the plaintiffs might direct; and that after that meeting he should at any time upon demand convey the property to the plaintiffs. The reason of this agreement was that it was supposed that the defendant could buy the property cheaper than the plaintiffs. The defendant made the purchase accordingly with the money, and after the October meeting they demanded a conveyance, which he refused to make. On these facts the court below found for the plaintiffs, and rendered judgment that the defendant convey the legal title to said interest by a good and sufficient deed of conveyance to the plaintiffs, within thirty days from the entry of the decree, and in default thereof that S. B. Davidson, who was appointed a commissioner for that purpose, make, execute and deliver the same, and for the costs of the plaintiffs. From this judgment the defendant appeals.

The law is well settled, that where one person pays the consideration money for the purchase of land, and the conveyance is made to another, the latter holds the title in trust for the person who pays the consideration: 2 Story's Eq. Sec. 1201; *Hidden* v. *Jordan*, 21 Cal. 99; *Simson* v. *Eckstein*, 22 Cal. 580; *Osborne* v. *Endicott*, 6 Id. 153; *Wells* v. *Robinson*, 13 Id. 141.

But the appellant contends that, there being a special agreement between the parties, this constitutes an *express* trust, as contradistinguished from the *implied or resulting* trust, which arises by implication from the payment of the consideration money; and that such *express* trust is within the Statute of Frauds, and could not be proved by parol evidence, as was

done in this case. Sec. 6 of the Statute of Frauds (Wood's Dig. 106) provides that no estate, interest, or *trust* in lands shall be created, granted, or assigned, *unless by act or operation of law*, or by deed or conveyance in writing; and Sec. 7 provides that Sec. 6 shall not be construed to prevent any trust from arising or being extinguished by operation of law. The trust in this case arises purely by operation of law, and results from the acts and agreements of the parties. In such cases the trust need not be created by writing, or proved by written evidence, for it comes clearly within the exception of the statute. There was no agreement, in terms, that the defendant should hold the property in trust for the plaintiffs, which would seem to be necessary to create an *express* trust; but from the facts that the purchase was made with the money of the plaintiffs, and the conveyance made to the defendant, the law implies that the title thus conveyed is held in trust for the person furnishing the money, and thus the trust is created by operation of law. The fact that the defendant agreed by parol to do what the law would compel him to do—that is, hold the title subject to the rights of the plaintiffs, and convey to them upon demand after a certain time, makes the trust none the less a trust created by operation of law. Indeed, it is a question whether the statute does not apply alone to the sale of lands, as between grantor and grantee, and not to contracts like this for the purchase of land by one person for the benefit of another. The law is well settled that in cases like the present the trust can be proved by parol evidence: Tiffany & Bullard's Trusts and Trustees, 189–192, 486–489; *Soggins* v. *Heard*, 31 Miss. 426; *Pritchard* v. *Wallace*, 4 Sneed, 405; *Osborne* v. *Endicott*, 6 Cal. 149; *Russ* v. *Mebius*, 16 Id. 356; *Lockwood* v. *Canfield*, 20 Id. 126; *Hidden* v. *Jordan*, 21 Id. 99. The cases referred to by the appellant do not conflict with this principle. In *Leggett* v. *Dubois*, 5 Paige, 117, the court say: "A resulting trust is the mere creature of equity, as a resulting use is of law; and it can not therefore arise where there is an express trust declared by the parties, *and evidenced by a written declaration of such express trust.*" In *Bellasis* v. *Compton*, 2 Vern. 294, the decision substantially is, that a resulting trust may be proved by parol and also defeated by parol proof of an agreement to a different trust from that which would be implied by law; in other words, it

sustains the well established principle that a resulting trust may be *defeated* as well as established by parol evidence. In *Leman* v. *Whitley*, 4 Russell, 423, the circumstances are entirely different from the present, as it was an attempt by a grantor to show by parol evidence that his deed, absolute in form, was intended to be in trust for certain purposes, and does not, therefore, apply to the case before us.

The judgment is affirmed.

CADWALADER'S APPEAL.

(64 Pennsylvania State, 293. Supreme Court, 1870.)

[1] **Trustee bidding at his own sale—Bidding on tract with known reservation of minerals.** Trustees, of whom Chew, who was beneficially interested in the trust, was one, sold land to H., reserving minerals. H. paid part of the purchase money. Other trust lands had been sold with similar reservations. The court decreed a sale of the subjects of the trust remaining unsold, the trustees being allowed to bid. The trustees sold the lands and also the minerals reserved under the tracts previously sold. The *tract* sold to H. was exposed and bought in by Chew for less than the balance due by H. *Held:* 1. That Chew bought only the minerals which had been reserved in the agreement with H. 2. That Chew, as trustee, knew of the sale to H. and his payment on account; and 3. That although permitted to bid he was bound to make a fair sale and act on his knowledge of the sale to H.

Knowledge of trustee presumed. A trustee is held to know of and be bound by what he has allowed to be done in his name, though acting by an attorney and without personal supervision of details.

A trustee permitted to bid at his own sale must act within the strictest line of his responsibility; and such permission will not allow a trustee to speculate on the trust.

It is a breach of duty for a trustee to sell a claim at less than its known actual value.

Appeal from *Nisi Prius*. George Cadwalader, William Rawle and Benjamin Chew, Jr., were trustees of an estate lying in Lycoming, Luzerne and Bradford counties, consisting of vacant tracts, some of which were supposed to contain minerals. They had made some sales in parcels, reserving the minerals. On May 25, 1854, they executed an agreement for

[1] *Watts' App.*, 8 M. R. 222; *Scholle* v. *Scholle*, 101 N. Y. 167; *Harts* v. *Brown*, 4 M. R. 1.

sale of 181 acres, reserving minerals, to J. W. Heylman at $5 per acre, on which Heylman paid on account $300; his time to pay balance extended to June 1, 1856.

In 1856 on petition to that effect the trustees were ordered by judicial decree to make sale of the tracts undisposed of, which were divided into two classes: 1, lands where no reservation of minerals was intended; and 2, those tracts from which minerals were to be reserved, including the reserve of minerals in tracts already sold subject to such reservation. Benjamin Chew, one of said trustees, and also beneficially interested, was allowed to bid at the sale. By some error the lot sold by articles to Heylman was placed in the first division and so was included in the order for sale as of the entire fee, and Chew, by his attorney, bid for it and bought it in at $248.87. In 1865 Heylman paid his balance of principal money to the attorney who had all this time represented the trustees, who receipted for it and sent on a deed to Philadelphia (containing no reserve of minerals), where it was signed by the two trustees who had succeeded Rawle and Chew, both deceased, Cadwalader, the surviving original trustee, being absent at the time.

In 1868 all the trustees filed a bill against Heylman and the parties who claimed under the will of Chew, their former co-trustee, who had, as stated, become the purchaser at public sale of this 181 acre tract.

The prayers of the bill were:

1. That the deed to Heylman be reformed so as to except minerals.

2. That the devisees under Benjamin Chew, Jr., be decreed to release to Heylman, reserving minerals.

3. That the deed under the decree by which Chew claimed title be reformed so as to be confined to such mineral reserve.

4. That Heylman release the minerals to those who claimed under the deed to Chew—offering to the representatives of Chew the option to take such title so perfected to the mineral reserve or to refund the bid which Chew had paid at the sale, and for general relief.

All other material facts are recited in the opinion.

On reference the master reported that there was no equity in the bill.

After exceptions the report was confirmed *pro forma* at *Nisi Prius*, and the bill dismissed with costs.

The plaintiffs appealed, assigning for error the decree of dismissal, and that the court did not make a decree according to the second and third prayers of their bill.

G. T. BISPHAM and E. K. PRICE, for appellants.

G. W. BIDDLE, for appellees.

The opinion of the court was delivered by AGNEW, J.

We think the master made a plain mistake of fact in his report on the evidence. He treats the public sale of the 181 acres, part of tract No. 1,758 in Lycoming county, as a sale to Colonel Benjamin Chew, of the entire legal title; and thence infers the duty of Heylman, the former purchaser of the trustees at private sale, to pay to Chew the unpaid purchase money. But it is impossible to close our eyes to the fact that the sale to Colonel Chew of the entire tract of 181 acres was founded in mistake, and was contrary to his duty as a trustee. He was one of the three trustees who had sold this tract to J. W. Heylman by articles dated May 25, 1854, at $5 per acre, amounting to $905; reserving all the minerals and mining privileges. On this contract Heylman had paid $300 June 6, 1854, and had entered into possession and made improvements. It is not material whether Colonel Chew participated actively in the sale to Heylman or not. As a trustee he knew or was bound to know of the sale, and payment on account of it. The petition for the sale of the trust lands in 1856, prayed expressly for a sale of all the subjects of the trust remaining unsold; and the decree of the court was made accordingly, and Colonel Chew was one of the trustees ordered to make the sale. His being permitted under the order of the court, to bid at the trustee's sale, to protect his beneficial interest in the subject of the trust, did not diminish his duty as a trustee to make a fair sale, or eradicate the knowledge to be imputed to him of the former sale of the trustees to Heylman. A trustee thus permitted to bid at his own sale, must act within the strictest line of his responsibility. His character as a bid-

der can not be permitted to derogate from his duty as a trustee. The tract of land sold to Heylman did not fall within the purview of the petition and order of sale. As to it, conversion had already taken place, and the order was not intended to give an authority to re-sell it. To comprehend it within the unsold lands was an evident mistake, excepting as to the minerals and mining privileges. The claim on Heylman was for purchase money, and the legal title was held in trust for him. The whole sum of $605 unpaid, and interest, were available to the trust. What sort of propriety would there be in permitting a trustee to bid in for himself the right to receive that sum belonging to his trust for the sum of $248.87? It was a breach of duty to sell the claim on Heylman, and still worse to pay for it less than half its actual value. It is very evident that the permission to bid to protect his interest in the unsold lands, did not allow him to speculate thus on the trust confided to him. To avoid such a conclusion against him we are bound to believe the sale of the entire 181 acres was a mistake, as doubtless it was, by including the tract in the first class of lands wholly unsold, instead of the second class consisting of the reserved mining rights.

The decree of the court of *Nisi Prius* must be reversed and a decree entered for comp'ainants, with costs. Let a decree be drawn up reforming the deed to William L. Marshall, so as to confine its terms to the unsold minerals and mining privileges of the 181 acres sold to Heylman, and confining to the parties claiming title under Colonel Benjamin Chew, the sale of the said minerals and mining privileges in the said tract of land; or permitting them to surrender the deed to William L. Marshall, to be canceled on a return to them of the purchase money and interest paid by Colonel Chew on the sale to Marshall, costs to be paid by parties defending under said deed to William L. Marshall.

DOYLE ET AL. v. THE PEERLESS PETROLEUM CO. ET AL.

(44 Barb. 239. Supreme Court of New York, 1865.)

[1] **After-acquired title a trust estate for grantee's benefit.** Title accruing to grantor after his grant must be in trust for the prior grantee: if conveyed afterward to another with notice, the second grantee will be substituted to the obligations of the grantor, but if the conveyance is executed under authority from the prior grantee, the subsequent grantee will receive it free from all trusts attaching to the land, arising from the acts of the grantor.

[2] **Collateral attack upon corporate organization.** If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the State alone to take steps to dissolve such corporation or forbid the exercise by it of corporate rights and franchises.

Courts of equity do not take cognizance of such questions in respect to corporations.

Appeal from a judgment entered upon the report of a referee. On the 16th day of December, 1864, the defendant, Joseph H. Suggett, sold and conveyed to the plaintiffs and the defendant Whalin, the undivided one eighth of the undivided one fifth of a farm of one hundred and thirty acres of land in Pennsylvania. Doyle paid $500, and the other two grantees $250 each. The plaintiffs at the time of taking the conveyance supposed that Suggett held the fee. Suggett in fact only held the equitable title by contract of purchase, in common with four other parties. These parties attempted to defraud him by causing the legal title to be conveyed, and on the 29th day of December Suggett commenced an action to secure his rights in the premises. This action was settled; the property was divided, and twenty-eight acres were conveyed to Suggett in severalty, and the remainder of the farm was conveyed to other parties in severalty. Suggett got his deed January 14th. The plaintiffs had no notice of the action by Suggett, and knew nothing of his proceedings. In the meantime Suggett had conveyed portions of the land to other parties, the same as to the plaintiffs. After Suggett received

[1] *Wiswall* v. *Stewart*, 32 Ala. 433; 70 Am. Dec. 549.

[2] *Crump* v. *U. S. M. Co.*, 3 M. R. 454; *Meeker* v. *Chicago Steel Co.*, 10 M. R. 203.

his deed, he called a meeting of the parties to whom he had sold, and at an adjourned meeting for the first time the plaintiffs learned the facts. Suggett stated to the meeting that he had acquired two acres more than one fifth, and he would convey this to the company if they would pay his expenses, etc., which proposition was accepted. At the first meeting it was proposed and agreed upon to form a manufacturing company by the owners of this land, and the papers were executed January 23d, at the adjourned meeting. At this meeting the defendants claim that a resolution was passed authorizing Joseph H. Suggett to convey the twenty-eight acres to the Peerless Petroleum Company. No minutes were kept by the secretary of the meeting. Mr. Harris kept some memoranda and wrote out the proceedings of the meeting the next day or later. The referee finds these minutes to be correct, but finds that the plaintiffs did not hear such resolution. He finds, however, that it was agreed by parol on that occasion that Suggett should convey the land to the corporation, and that his grantees should surrender their deeds. The referee also finds that the sole object of all these transactions was to place the title to the twenty-eight acres of land in the best possible condition to benefit the several persons executing the said papers, and other grantees if they sought to come in. The answer alleges the same thing. The next day after the meeting, before the papers had been sent to Albany, Doyle, on behalf of himself and Joyce, notified Suggett and the attorney of the company that he desired to withdraw and have nothing more to do with it. Immediately after this Suggett conveyed the whole twenty-eight acres to the Peerless Petroleum Company. Doyle had nothing further to do with the company. Joyce attended one meeting afterward, but did not vote. The plaintiffs requested from the company a release of their interest, which was refused; whereupon they brought this action, praying for a judgment and decree directing the Peerless Petroleum Company to release and convey to the plaintiffs their portion of said premises, and that it might be partitioned and set off to them in severalty; for an injunction against the selling or leasing of the premises, and for general relief.

J. C. COCHRANE, for the plaintiff.

IVES, HARRIS and POND, for the defendants.

By the Court, E. DARWIN SMITH, J.

The questions presented for our decision in this case are in a narrow compass. When Joseph H. Suggett conveyed to the plaintiff and the defendant Whalin an undivided one eighth part of one fifth of the farm mentioned in the pleadings and case, he had no legal title to such farm. He had merely an equitable title or interest therein, and could convey no higher title than he possessed. When afterward he acquired title, and upon the partition of said farm became seized of twenty-eight acres thereof, he took and held such title, in equity, in trust for the plaintiffs and the other parties to whom he had previously executed like conveyances. The legal title which he acquired and held at the time of his conveyance of the said twenty-eight acres to the defendants, the Peerless Petroleum Company, clearly passed to that company by the conveyance for that purpose, executed on the 24th of January, 1864. If such conveyance to said company was without the authority and consent of the plaintiffs, so far as their interest therein is concerned, the Peerless Petroleum Company must be deemed substituted in the place of the said Joseph H. Suggett as the trustee of such title for the plaintiff, and should be compelled to reconvey to them, respectively, their proportionate interests in said land. The company knew of the trust of Suggett, and in what right, and for what purpose he acquired such title, and taking such title with a full knowledge on their part of all the equities of the parties interested therein, they are clearly bound in equity to execute the trust, unless the same had been executed by Suggett and been legally extinguished with the consent of the *cestui que trust*.

This presents the chief question in the case. The referee finds, as matter of fact, that after Suggett had obtained title to the said twenty-eight acres, he called together all his grantees, and it appears that there were quite a number having similar deeds to those given the plaintiff and the defendant Whalin, and fully and fairly stated to them what he had done, and claimed that they should pay the expenses of a litigation he had had in securing said title, and proposed that he would convey for their benefit to the extent of their several interests in the said twenty-eight acres. That thereupon a discussion arose

as to the safest and best way to take such land, which resulted in an agreement on the part of the shareholders of the farm under deeds from the said Suggett, to form a corporation under the laws of this State as preferable to a partnership or other mode of taking title. That accordingly a suitable person was employed to draw the requisite papers for the organization of a corporation; that a large meeting of such grantees was afterward held, at which said corporation was formed and the requisite papers duly executed by the plaintiff with the others of the said grantees, organizing themselves into a corporation by the name of the Peerless Petroleum Company. That at this meeting it was unanimously resolved "that the said Joseph Suggett convey the whole of the said twenty-eight acres of said land to the said corporation, and that the members should be entitled to subscribe for shares of stock in the company in proportion to their several interests in said farm, or in said twenty-eight acres, in satisfaction thereof."

The referee reports that this resolution was passed at such meeting as above stated, but says the plaintiff did not hear said resolution; but he finds that it was distinctly understood and agreed by parol on that occasion that Suggett should convey the said land to the corporation, and that his grantees, including the plaintiff, should surrender their deeds or otherwise cancel them, and that the transfer of the twenty-eight acres should be in lieu thereof; that on the faith of this agreement all who were present at that meeting executed the articles of association, copies of which are set forth in or annexed to the defendant's answer in this cause. That the amount of the several shares was ascertained and apportioned on the basis of the relative interests in the said farm which Suggett had undertaken to convey to them (his said grantees). Upon this finding Mr. Suggett was clearly authorized and requested to execute his trust in respect to said land by a conveyance thereof to the said petroleum company, and said company received it free from all trusts attaching to it on his part. It appears that the plaintiffs changed their minds in respect to such corporation, and that the plaintiff Doyle informed some of the parties connected therewith, and in the presence of Mr. Suggett, that he was dissatisfied with the election of the officers of said company, and expressed a desire to withdraw from

the company. But the referee finds, as matter of fact, that Doyle did not, in any way, intimate to Suggett that he desired him not to execute a conveyance to the company; and the referee also finds "that there was no revocation in fact by either plaintiff in the transactions at the meeting of the 23d of January, or any or either of them." Upon these and the other findings of the referee upon the facts, I do not see how we can disturb the judgment rendered by him, or why his conclusions of law were not warranted by the facts which he held to be established. The points made by the plaintiffs' counsel in respect to the organization of the defendant corporation and the purposes of such organization I have not discussed, because it seems to me quite clear that the corporation was apparently legally organized, and upon its face for a lawful object, and the plaintiff being a member of such corporation could not question the lawfulness or regularity of the proceedings for its organization. The courts of equity do not take cognizance of such questions, in respect to corporations. If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the State alone to take steps to dissolve such corporation or forbid the exercise by it of corporate rights and franchises: *Buffalo R. R.* v. *Cary*, 26 N. Y. 75.

The judgment should, therefore, be affirmed with costs.

BREWSTER v. SIME ET AL.

(42 California, 139. Supreme Court, 1871.)

Weight of evidence not important on appeal in case of conflict. Though the Supreme Court may consider a judgment of a district court against the weight of evidence, it will not disturb it on that ground, if there is a substantial conflict of evidence.

[1] **Owner of mining stock bound by acts of "trustee."** Where mining stock was placed by the owner in the name of another person, as "trustee," on the books of the corporation, nothing more appearing, and such trustee hypothecated it to bankers, who had no notice of who the owner

[1] *Thompson* v. *Toland*, 2 M. R. 77; *Cowell* v. *Springs Co.*, 100 U. S. 55.

was, for moneys advanced by them to him: *held*, that the owner was bound by the acts of the trustee.

[1] **Word "trustee" in stock not notice of secret owner's equities.** The mere addition of the word "trustee," after the name of a person to whom stock is transferred, is not sufficient to put persons dealing with the trustee upon inquiry as to the trustee's title, nor will it operate as constructive notice of the owner's equitable right.

"Trustee" of stock may sell or hypothecate it. The mere fact that a person holding the legal title of stock, and apparently having the right of disposition, is styled "trustee," raises no implication that he has not authority to sell or hypothecate it in the usual course of business.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This was an action to recover the sum of $7,500, the value of 269 shares of the capital stock of the Exchequer Mining Company, alleged to have been converted by the defendants. It appears that in 1867 Joseph Tilden hypothecated 500 shares of the stock of that company with defendants, as collatera security for a debt of $18,675. Of these shares the 269 referred to stood in Tilden's name as "trustee," on the books of the company, but belonged in fact to the plaintiff.

There having been a judgment in the court below in favor of defendants, and a motion for new trial denied, the plaintiff appealed.

J. W. WINANS, for appellant.

JOHN B. HARMON, for respondents.

By the Court, CROCKETT, J.

There are in this case but two material questions of fact, and two of law. The questions of fact are: First: did Tilden pledge to defendants plaintiff's stock as collateral security for a loan made at the time? Second: did the defendants then have actual notice that the stock belonged to plaintiff and not to Tilden? On both these points there is a substantial conflict in the evidence. The defendant Hastings testified explicitly that this, with other stock, was hypothecated with the defendants by Tilden, as security for a loan made at the

[1] *Contra, Shaw* v. *Spencer*, 100 Mass. 382; 97 Am. Dec. 107.

time, and that they had no knowledge or notice that the plaintiff owned any part of it, or that it belonged to any one else than Tilden. The defendant Sime testifies substantially to the same facts; and on the first point they are corroborated to some extent by the witness Sharp. On the other hand, Tilden testifies that the plaintiff's stock was not included in the hypothecation; and his testimony tends to show that Sime had actual notice that the stock belonged to the plaintiff. It was for the court below to weigh the evidence, and to determine what credence the respective witnesses were entitled to. In such cases it is not our practice to disturb the judgment on the ground that it is not justified by the evidence, even though we should consider it to be against the weight of evidence.

The questions of law are: First, whether the fact that the stock stood on the books of the corporation in the name of Tilden, "*trustee*," was sufficient to put the defendants upon inquiry as to the plaintiff's title, and operated as constructive notice of his equitable rights; second, whether the fact that the plaintiff, on his departure for Europe, had placed the stock in Tilden's hands for sale, with authority to transfer it on the books of the corporation, had the effect to clothe him with such *indicia* of ownership as to protect the defendants, if in good faith and ignorance of the plaintiff's rights they advanced money to Tilden on the hypothecation of the stock.

I am duly sensible of the gravity of these questions, in a community where transactions in stocks to a large amount are daily made, and where it is a matter of general notoriety that it is a common practice to transfer stocks into the name of some person as "trustee," for the sole purpose of concealing the name of the real owner, whose transactions in buying or selling a particular stock, if his name were known, might operate to enhance or depress its market value. To avoid this result, and also, possibly, with a view to escape assessments upon stocks of doubtful value, or to protect his credit from the damage to which it might be exposed if it were known that he was a large operator in certain stocks, the owner frequently resorts to the device of causing the stock to be transferred into the name of some other person, as "trustee." In such cases the trustee is a mere man of straw, having no interest in the stock nor any trust to perform, except to manage and

dispose of it as the owner shall direct. This practice has become so notorious in this State that we can not affect to be ignorant of it.

In view of the general prevalence of this practice what effect in law should be given to the fact that there is appended to the name of the person to whom the certificate is issued the word "trustee"? Shall this be held to operate as constructive notice to all persons dealing with the so-called "trustee" that he is not the owner? Must they deal with him at arm's length, and if they shall purchase the stock, or loan him money upon it, do they take the hazard that on the next day, or the next month, the secret owner may disclose himself and repudiate the transaction and demand the stock? In my opinion, considerations of public policy and common justice demand that when stock is placed in the name of a "trustee" under these circumstances, the secret owner shall be bound by the acts of his "trustee" dealing with persons who have no actual notice of the relations between the parties. If nothing more appear on the books of the corporation, or on the face of the certificate, to indicate the trust and its nature, than the mere addition to the name of the word "trustee," the owner, who has clothed his agent with the legal title, one of the highest *indicia* of ownership, should bear the consequences resulting from the acts of the agent, rather than an innocent person who advances his money on the faith that the agent is the real owner, or at least has authority to sell or hypothecate the stock. I am not, however, to be understood as holding that words may not be inserted in a certificate which would so clearly indicate a trust and its nature as to limit the power of the trustee, and operate as constructive notice of the equities of the *cestui que trust*. All that is intended to be decided is that the mere addition of the word "*trustee*" after the name in the certificate is not, in this State, of itself, nothing more appearing, to be deemed constructive notice of the equities of a secret owner of the stock. If it is intended that the so-called trustee shall not have power to sell or hypothecate the stock, without the express consent of the equitable owner, it is an easy matter to limit his authority by apt words in the certificate. In the absence of such words, the mere addition of the word "*trustee*" after the name will not have the effect

to limit the absolute power of disposition, or to operate as constructive notice of any secret equities, as against persons who, in good faith, purchase or advance money on the stock without notice. Standing alone, the mere fact that a person holding the legal title, and apparently having the right of disposition, is styled "*trustee*," raises no implication that he has not authority to sell or hypothecate the stock in the usual course of business. If it should be held to raise a presumption that some one else was the owner, nevertheless the inference would be, that, in clothing the trustee with the legal title, he had invested him with authority to sell and hypothecate in the usual course of business. And the rule is universal, that where the legal title and apparent right of disposition is vested in a person upon some secret trust, which restricts the powers of the trustee as between the parties, nevertheless the rights of purchasers, pledgees and mortgagees, in good faith, for a valuable consideration paid at the time, and without notice, are unaffected by the trust.

The transaction between the plaintiff and Tilden was, in my opinion, a secret trust within the true sense and spirit of this rule. When about to leave for Europe the plaintiff indorsed his certificates of stock, so that they could be transferred in his absence, and deposited them with Tilden for sale, knowing that he, thereby, enabled him to transfer the legal title and apparent ownership into his own name. He placed Tilden in a position to represent the stock as its true owner. The indorsement and delivery of the certificates to him, so that they could pass by delivery and might be transferred at his option, clothed him with all the *indicia* of ownership, and enabled him to hold himself forth as the real owner. If Tilden had caused the stock to be transferred to himself, omitting the word "*trustee*" from the certificate, it can not be doubted that he would, apparently, have been the real owner, with a perfect title. There would have been nothing on the face of the certificate, or in the corporate books, to awaken the slightest suspicion that he was not the owner. In that event, if the defendants, finding his title perfectly regular on its face, had loaned him money on a pledge of the stock without notice of the plaintiff's equities, the lien for their advances would have been unquestionably good as against the

plaintiff. After enabling Tilden to invest himself with a legal title, perfectly regular on its face, and apparently valid, the plaintiff would be estopped to deny Tilden's title as against purchasers or pledgees who advanced their money in good faith in the ordinary course of business, and without notice of the plaintiff's equities. If the rule were otherwise, there would be an end to transactions in stocks. If purchasers and pledgees dealing with titles strictly regular and apparently valid on their face, are to take the hazard of all latent equities existing in the hands of any antecedent holder of the stock, prudent persons would abstain from such perilous ventures. If Tilden, in violation of his agreement with the plaintiff, has caused the stock to be transferred to himself, and has hypothecated it for his own account, instead of selling it for account of the plaintiff, he is liable in damages for a breach of the contract. But after enabling Tilden to invest himself with the legal title and apparent ownership, on the faith of which he obtained advances from the defendants, without notice of the plaintiff's equities, the plaintiff occupies the relation of *cestui que trust* attempting to assert a secret trust against persons who, in ignorance of the trust, have made advances on the property to the trustee holding the legal title and apparent ownership. If Tilden has perpetrated a fraud, the plaintiff enabled him to do it, by placing it in his power to invest himself with the legal title and apparent right of disposition, and his equities are inferior to those of the defendants, who, in good faith, and without notice, made advances on the stock in the belief that Tilden was the owner, or, at least, had the right to hypothecate it. There is nothing new in these propositions. In this State stock is personal property, and the general rule is, that if the owner of such property places it in the possession of another, and confers upon him the usual *indicia* of ownership or right of disposal, he is bound by any disposition made of it, to one who acquires it, without notice, for a valuable consideration on the faith of such *indicia: Saltus* v. *Everett*, 20 Wend. 278, 280; *Com. Bank* v. *Kortright*, 22 Wend. 361; *Western Transportation Co.* v. *Marshall*, 37 Barb. 509, 515; *Crocker* v. *Crocker*, 31 N. Y. 507; *Fatman* v. *Lobach*, 1 Duer, 354; 2 Kent's Com. 621; Story's Agency, Secs. 83, 94, 228; *Bridenbecker* v. *Lowell*, 32 Barb. 17;

Johnson v. *Jones*, 4 Barb. 373; *Bank of Metropolis* v. *New England Bank*, 1 How. 240.

The mere delivery of the possession of personal property does not, standing alone, constitute such an *indicium* of ownership as will bind the owner. For example: If A loan his horse to B temporarily, the latter can make no disposition of it which would bind the owner. But if the delivery be accompanied by an absolute bill of sale, and if B exhibits the bill of sale to a purchaser who buys in good faith, without notice, in the belief that B is the owner, A will be bound by it, even though it was secretly agreed between A and B that notwithstanding the bill of sale the horse was to remain the property of A: *Ballard* v. *Burgett*, 47 Barb. 646; *Covill* v. *Hill*, 4 Denio, 327. There must be something more than the mere delivery of the possession to constitute such *indicia* of ownership as will bind the owner. But in this case the plaintiff not only delivered to Tilden the possession of the certificates, but accompanied the delivery with an authority to transfer the stock on the corporate books, whereby Tilden was enabled to procure new certificates in his own name, vesting in him the legal title and apparent right of disposal. This brings the case fully within the rule already discussed, and estops the plaintiff from setting up his title in derogation of the defendants' lien.

Judgment affirmed as of the 2d day of October, 1871.

PALMER v. WILLIAMS ET AL.

(24 Michigan, 328. Supreme Court, 1872.)

[1] **One owner made trustee for all.** An agreement whereby property owned in common is put in the name of one of the owners, to be held by him for the benefit of all parties "subject to such decisions as the parties may direct from time to time," gives him no right to sell the whole without the consent of all the owners; and a sale to a purchaser with notice can convey no more than his personal interest.

Trustee bound by instructions. When authority in such case is given to the trustee to make sale on specified terms, he can not make it except in compliance with his instructions, and can not give credit where he is told to sell for cash.

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[1] *Settembre* v. *Putnam*, 11 M. R. 425.

Consent to sell at a certain time at a certain price. When the intended sale falls through it does not operate as a continuing power to sell at any time, especially where the property is mining land and fluctuating in value; and new authority is required after any considerable interval even though the price obtained may be larger than that before provided for.

Ratification of unauthorized sale—Estoppel. An unauthorized sale of land can not be ratified, except in writing or by such conduct as creates an estoppel; and such ratification must be by a party informed of the facts. And there can be no estoppel, unless a party is misled to his prejudice by the one against whom it is set up and does material acts relying upon conduct well calculated to mislead him.

[1] **Payment before notice—Payment after notice.** No one is protected as a *bona fide* purchaser who has not made payment before notice. It is not enough that he purchases without notice, if he pays after notice.

Appeal in Chancery from Houghton Circuit.

This bill was filed by Charles H. Palmer against William W. Williams, Raphael Pumpelly, Thomas B. Brooks and John L. Spurr. The defendants answered, and proofs were taken. The decree was for complainant, and the defendants, Pumpelly, Brooks and Spurr, appealed to this court.

HUBBELL & CHADBOURNE, SUTHERLAND & WHEELER, DOUGLASS & MILLER, S. F. SEGAR and ASHLEY POND, for complainant.

WILKINSON & SMITH, MOORE & GRIFFIN and GEORGE V. N. LATHROP, for defendants.

CAMPBELL, J.

Complainant files his bill to enforce his rights as *cestui que trust* in certain lands in Houghton county, which were entered in the name of Williams, who continued to retain the title until, in February, 1869, he sold and conveyed to the other defendants the entire estate, although Palmer was entitled to one third. Complainant claims that this sale was made with notice of his interest, and that he should be protected against it. The defendants, besides relying on want of notice, claim that Williams had a right to convey, and that Palmer has become estopped from disputing the sale.

[1] *Brophy Co.* v. *Brophy Co.*, 10 M. R. 602; *Lakin* v. *Sierra Buttes M. Co*, 25 Fed. 337.

The agreement under which Palmer claims, after reciting Palmer's rights to one third, continues as follows: "And, whereas the certificates for said lands are in the name of the said W. W. Williams, it is understood and hereby agreed between the parties, that so long as the property remains in the name of the said W. W. Williams, the same shall be held by the said Williams as trustee, for the benefit of all the parties in interest, and subject to such decisions as the parties may direct from time to time."

The history of the negotiation shows the following facts: In October, 1868, Spurr wrote to Williams from Lake Superior (Williams being in Manlius, New York), inquiring about this land, speaking of it as timber land, and saying he desired to purchase it to enable him to carry out a wood contract, and proposing to make payments in accordance with the payments coming in under that contract. The evidence tends to show that Spurr and his associates had ascertained that valuable iron deposits were on the land, and that the wood contract was a subterfuge, no such contract existing, and the lands having no special value for timber. Williams replied October 10th, offering to take $10,000 for it, and intimating that there was a good show of iron on it. Spurr wrote again on the 22d of October, conveying the idea that the suggestion about iron was new to him, and that upon receiving it he had gone out to examine the property with an agent of other parties, who proposed, if it was good iron land, to join with him in the purchase and let him have the timber; but that the snow prevented any satisfactory examination, and that his friends would not invest at such a price without further exploration, which could not be made till spring; but that they had decided to offer $6,000, which he regarded as a large price and upon great risks. Williams, on the 29th of October, offered to split the difference and take $8,000. This offer was at once accepted, both by telegraph and by letter, in Spurr's name, by Brooks and Pumpelly, with the statement that Pumpelly would soon go East and complete the bargain. On the 10th of December a written contract was made in Pumpelly's name to be carried out in sixty days. On the 8th of February, 1869, the deed was delivered conveying the land to all three, for $8,000, half down and the balance in one and two years, secured by notes and mortgage.

During the personal negotiations with Pumpelly, in December, the evidence shows that Williams informed him of Palmer's interest, and that he had a letter written within a year which he claimed gave him authority to sell. Pumpelly did not apply to examine it, nor did he make any inquiry of Palmer; and no intimation was given to him until April.

Our Statute of Frauds declares void every contract for the sale of any interest in lands not made in writing by the party by whom the sale is made, or by an agent, by him lawfully authorized, in writing. The first question to be settled is whether Williams had any such written authority.

There was no power of sale reserved in the original contract or declaration of trust. That expressly declared that the land was to be held "subject to such decisions as the parties may direct from time to time." This contemplated that this power of direction should be continuous, and exercised whenever occasion might require; and it precluded any right of disposal without consultation with Palmer. If the authority existed it must have been elsewhere. And it is claimed to have been contained in letters written in the winter of 1867–8.

On December 6, 1867, Williams wrote to Palmer from New York that he had just seen C. C. Douglass, who wanted to know what they would take for this land, and that he had offered it at $6,000 if Palmer should be willing, and that Douglass wanted him to write to Palmer about it. To this Palmer replied as follows:

"I have your letter of the 27th. The land at Lake Michigan consists of one hundred and sixty acres. At six thousand dollars it would be about forty dollars per acre. I would sell at six thousand dollars. What does Douglass want of it? Does he want it to go with some of his own lands? My opinion now is to sell most decidedly. Sell for cash and send me a certificate of deposit for my half forthwith;" and in a postscript he continues: "I wish you would write me at once about the sale of these one hundred and sixty acres of iron land. Knowing what Douglass wants of it you can tell well enough what is the most he will give for it, and that price I would take. It is generally better to do well than to wait upon the uncertainties of doing better." In March, 1868, Palmer inquired in a letter to Williams about this sale, of

which he had no further advices. It seems to have fallen through. The only further reference to it is in one of Williams' letters to Spurr, in which he speaks of the fact that the land was worth $6,000 in the previous winter, as showing that $8,000 was then too low a valuation.

This correspondence does not amount to a continuing power to sell. It refers to a particular sale, and authorizes it to be made for cash, and rests somewhat on the idea that the purchaser named would be likely to give all the land would bring. But the terms of the trust evidently contemplated that the value was likely to fluctuate and that directions would be given from time to time. While the correspondence shows an entire willingness to make a cash sale for $6,000 at that time, there is nothing to indicate a desire to leave an unlimited future discretion to Williams to sell without further consultation, and the condition of a cash sale was explicit.

It is also to be remarked that the purchasers did not see these letters or rely upon them. They were in no way misled in the matter. And as the purchase is shown to have been made at about one fourth of the lowest estimate then put upon the property by Mr. Spurr, it is quite plain that the risk of Palmer's interest would not have materially interfered with it at the price agreed upon with Williams. The contract made with Pumpelly was apparently made upon the assumption that Williams had a right to convey, and without any discussion on that point beyond the mention of his interest and of Williams' authority as derived from him.

The nature and extent of the notice at this time need not be a very material element in the case, because at the time of the filing of the bill in this cause one half of the purchase money was unpaid; and as Palmer's interest was only one third, the defendants could not be regarded as *bona fide* purchasers without notice of his portion, even had there been no previous knowledge of it. The rule uniformly settled in this State is, that payment must be made before notice in order to secure the title to the land purchased: *Blanchard* v. *Tyler*, 12 Mich. 339; *Thomas* v. *Stone*, Walk. Ch. 117; *Dixon* v. *Hill*, 5 Mich. 404; *Warner* v. *Whittaker*, 6 Mich. 133; *Stone* v. *Welling*, 14 Mich. 514.

The purchase from Williams was not either at the date of

the contract, when nothing was paid, or at the date of the deed when half the consideration was paid, entitled to any protection as against Palmer. It can not be maintained unless there has been some ratification of the unauthorized act of Williams.

This ratification, if not made in writing with due knowledge of the circumstances, could only be made out by such conduct on Palmer's part as would equitably estop him from insisting on his rights. And such an estoppel would not be made out unless defendants had been so far misled by him to their own prejudice, that justice demanded their protection against him.

There is no such case made out. In the absence of any conduct designed or calculated to mislead, mere delay will not deprive an owner of his estate, legal or equitable, until barred by some clear rule of equity. It is not like a case where a party has been defrauded into doing an act himself, which he seeks to have rescinded, and where continued silence, after the discovery of the fraud, may become a bar without reference to any fixed period. Here there has been an unauthorized assumption of agency where the parties dealing with the supposed agent are bound to show his authority, or a ratification of it, in some form.

The trustee, Mr. Williams, never reported to Palmer until April, 1869, when he sent from Detroit a statement of the sale, and instead of one third of the $8,000 in cash, a note for $2,000, and $584.82 in money. Palmer at once went into Detroit, as he says, to object to the sale, but Williams had left. During the summer he had more or less intercourse and correspondence with some of the defendants, and recognized them as having the title to the land, and made overtures toward purchasing an interest from them. He testifies, however, and upon this there is no dispute, that he had no knowledge or information as to the real state of the case, or that they had received any intimation of his rights. They did not apply to him for any ratification of the contract, neither did they take any action upon the faith of any supposed ratification. Up to the time of filing the bill, there had been no substantial change in the position of the parties, and their equities remained as they had been in the beginning. Of the manner in which they induced the sale, and the representations in contradiction of their actual knowledge of the great value of the

property when they purchased, Palmer had no knowledge whatever.

There is then no foundation for an estoppel. This being so, and there having been neither original nor ratified agency, Palmer has never lost his title. The decree below enforcing it was correct, and should be *affirmed, with costs.*

The other Justices concurred.

BRIGGS v. DAVIS.

(81* Pennsylvania State, 470. Supreme Court, 1875.)

[1] **Devise of profits of coal mining among children and survivors.** A testator devised that "all the coal in all my lands be kept and worked as a whole for the equal benefit of all my children during their lifetime," the children of any dying to have the parents' share; if any died without issue the share "to go in equal parts to my surviving children and their lawful surviving children. All the coal in all my lands shall be kept together until worked out for the use of my children as above stated, and not sold or divided, but worked for the use of my heirs as above stated." *Held*, that the children took but a life estate in the profits of coal lands; the trust lasted only to the death of the last survivor, and after his death the children of those deceased would take a fee in the coal, if any remained; there was not a perpetuity.

[2] **Executors working mines in trust.** A direction to executors to work and manage the coal under the lands of testator, and divide the profits among the children, creates an active trust.

Error to the Court of Common Pleas No. 2, of Allegheny County.

This was an action of covenant in which Thomas A. Briggs was plaintiff and James Davis defendant.

On the 27th of September, 1875, a case stated was agreed on and filed. It contained the following facts, etc.:

Thomas W. Briggs died on the 15th of August, 1874, having left a will dated May 27th of the same year, and proved the 24th day of the following August.

Among other provisions the will contained as follows:

"5. I will and direct that when all my debts are paid that

[1] *Livezey's App.*, 106 Pa. St. 201; *Forcey's App.*, Id. 508.

[2] *McNeillie* v. *Acton*, 4 De Gex, M. & G. 744.

all profits arising from my property, real and personal, be equally divided annually among my seven children, share and share alike, as soon as they come of age, or to the guardian of any under age, by my executors.

"6. I will that my executors have full power to rent and manage, for the use of my heirs, all my real estate, and when all my debts are paid, if a majority of my children wish, the said executors may divide the surface of all my real estate in seven shares of equal value, to be chosen by the children according to age, beginning with the eldest.

"7. I will that all the coal in my lands be kept and worked as a whole for the equal benefit of all my children during their lifetime, and any of my sons or daughters dying and leaving lawful children, the said child or children shall have the father's or mother's share of my estate. But if any of my sons or daughters should die without leaving lawful children, then their share and interest in my estate shall go in equal parts to my surviving children and their lawful surviving children. All the coal in all my lands shall be kept together until worked out for the use of my children as above stated, and not sold or divided, but worked out for the use and benefit of my heirs, as above stated.

"8. I will and direct that my son, John Wesley Briggs, shall choose a lot with the other heirs. He is only to have the profits of it during his life, and at his death the right and title of the same is to go in equal parts to my surviving children and to their children; as he is only to have an equal share of the profits derived from my estate during his natural lifetime, but no title nor interest to his heirs after his death, his interest entirely ceasing after his death.

"9. My children and heirs at this time are as follows John Wesley Briggs, Thomas Albert Briggs, Mary Melissa Hammett, George Briggs, Eliza D. Hyatt, Ann Jenetta Briggs, Mary Jane Briggs.

"10. And last I do hereby constitute and appoint my son, Thomas Albert Briggs and my son-in-law Charles Hammett, to be my lawful executors, with full power to carry out the provisions of this my last will."

The same children were living at the time of his death and at the present time.

The testator died seized of a piece of ground in Baldwin township, Allegheny county, bounded by lands of Joseph Lynn and others, containing five acres, more or less. On the 1st of September, 1875, the plaintiff and defendant entered into articles of agreement, under seal, by which the plaintiff agreed to convey to the defendant, "by a good and sufficient deed in fee simple * * * an indefeasible title to * * * the undivided one seventh of the bituminous or stone coal underlying" the above mentioned piece of ground, the defendant in consideration agreeing to pay the plaintiff the sum of $350, viz., $150 on the execution and delivery of the deed, and $200 in a year thereafter.

On the 22d of September the plaintiff tendered a deed to the defendant and demanded the $150, the first payment. The defendant refused to accept the deed and pay the money, on the ground that the plaintiff could not convey to the defendant an estate in fee simple in the land, the will of Thomas W. Briggs not having passed to him such an estate.

It was agreed that if the court should be of opinion that if the plaintiff was seized of and could convey to defendant an estate in fee in the land, judgment should be entered for the plaintiff for $150 and interest, etc. If the court should be of opinion otherwise, judgment to be entered for the defendant.

The court, EWING, P. J., September 27, 1875, entered judgment for the defendant.

So entering judgment was assigned for error by the plaintiff on the removal of the record to the Supreme Court by writ of error.

G. SHIRAS, JR.—The devise of the profits is a devise of the corpus of the estate: *Schriver* v. *Cobeau*, 4 Watts, 130; *Hellman* v. *Hellman*, 4 Rawle, 444. There was no trust under the seventh clause of the will: *Yarnall's App.*, 20 P. F. Smith, 336; *Ogden's App.*, Id. 501. If there were it would be inoperative, as creating a perpetuity.

J. M. STONER, for defendant in error.—The will imposes active duties, as to the coal property, on his executors as trustees: *Sheet's Estate*, 2 P. F. Smith. 266. The trust, therefore if otherwise valid, will be supported: *Bacon's App.*, 7 Id. 504; *Rife* v. *Geyer*, 9 Id. 396; *Earp's App.*, 25 Id. 119. The words

"children" and "heirs" are used interchangeably. The trust is limited to the lives of his seven children and the survivor.

The coal lands shall be kept until worked out, for the use of his children; not sold or divided, but worked for the use and benefit of his heirs.

Judgment was entered in the Supreme Court November, 1875.

PER CURIAM.

Under the will of Thomas W. Briggs, his son, Thomas A. Briggs, took only a life estate in the profits of the coal land. The executors were made trustees to manage and work the coal in the land during the lifetime of his children, and to divide the profits among them equally. This was an active trust. If any of the children died leaving lawful children, they should have the father's and mother's share, but if any of the children died without lawful children, their shares should go in equal parts to the survivors and the children of the deceased children. This was not a perpetuity, because the trust was to last only until the death of the last survivor; the children of those deceased could then take the fee, if any coal remained.

Judgment affirmed.

STITH v. LOOKABILL.

(76 North Carol'na, 465. Supreme Court, 1877.)

[1] **Cestui que trust in possession holds against trustee's deed.** A grantee of a trustee who holds only the legal title to land stands in the shoes of the trustee. In an action by such grantee against the person entitled to the equitable estate who was in possession, for the recovery of the land: *Held*, that the plaintiff was not entitled to recover.

Informal transfer of equities. Deeds and proceedings showing value and *bona fides* may pass an equitable title though they might be insufficient to pass the legal title as such.

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[1] *Stonecifer* v. *Yellow Jacket M. Co.*, 3 M. R. 4; *Gillett* v. *Treganza*, 7 M. R. 15.

Civil action to recover possession of real estate, tried at fall term, 1875, of Cabarrus Superior Court, before SCHENCK, J.

The plaintiff claimed as devisee of one A. B. Stith, who bought the land in controversy at execution sale. The defendant claimed as tenant of one Sturges, who claimed to be the owner in fee of said land, or if not the owner in fee, then the beneficiary owner, and entitled to the equitable fee therein, but by consent of both parties the court found the facts to be as follows:

1. Plaintiff and defendant both derive title from one John M. Lisle, who executed a deed in trust to one Camman on the 9th July, 1853.

2. Under certain proceedings (which were admitted) in which said A. B. Stith was plaintiff and said Camman defendant, a levy was made on the 27th of September, 1855, and thereafter a sale and deed were made by the sheriff to A. B. Stith, conveying the land in dispute. A. B. Stith died leaving a last will and testament in which he devised said land to plaintiff.

3. That said deed in trust from Lisle to Camman conveying said land was executed at the instance and by the direction of the Conrad Hill Gold and Copper Company.

4. That one George R. Haywell negotiated said sale to said company at $40,000, and that, in pursuance of their original purpose, the North Carolina Mining Company, through the efforts of said Haywell, a member thereof, became a branch of said Gold and Copper Company.

5. Said property went into the possession of said mining company on 7th of July, but the said deed from Lisle to Camman was not really executed on the 9th of July, 1853.

6. On the 19th of October, 1854, said mining company executed a deed of trust conveying said land to one Sloan, who took possession of the same, and during his occupancy of about six years, he paid certain debts against both of said companies, and contracted others in course of his operations, and to pay these he advertised and sold said land according to the provisions of said trust, when one Russell Sturges became the purchaser and obtained a deed.

7. That plaintiff and his devisor were stockholders in said mining company, and assisted in its organization; that said

Sturges was a member of said Gold and Copper Company, and that said Camman, individually and as trustee, had full knowledge of all said proceedings and assented thereto.

His Honor thereupon held, that plaintiff was the owner of the legal estate subject to the equities of the *cestui que trusts* under the Camman deed. The devisor of plaintiff being a purchaser at sheriff's sale, succeeded only to the rights of the defendant in execution, and is affected by all the equities against him; in other words, Stith stands in the shoes of Camman: *Walke* v. *Moody*, 65 N. C. 599. If Camman is estopped to deny the equitable or legal title of Sturges, so is Stith and his devisee, the plaintiff; and Camman taking interest and advantage by and under his acts and deed is estopped from denying the deed of Sturges who claims directly through him.

The motion of plaintiff for writ of possession was overruled. Judgment that defendant go without day and recover costs. Appeal by plaintiff.

Mr. W. H. BAILEY, for plaintiff.

Messrs. DILLARD & GILMER and J. M. MCCORKLE, for defendant.

READ, J.

Land is conveyed to A in trust for B.

A has the legal title and conveys to C.

B has the equitable title and conveys to D.

Who is entitled to hold the land in this court, C or D?

Very clearly D is entitled to hold the land in a court of equity as this is.

That is substantially this case, and that principle settles this case in favor of the defendant.

John M. Lisle conveyed the land to one Camman in trust for certain persons. The plaintiff's devisor had an execution against Camman, levied on the land and bought it at sheriff's sale. That puts the plaintiff in the shoes of Camman with the naked legal title.

The *cestui que trusts* conveyed to Sloan who conveyed to the defendant's landlord. That puts the defendant in the shoes of the *cestui que trusts* with the equitable title.

The plaintiff insists that even if that principle be correct, yet it does not apply here because the defendant does not represent the *cestui que trusts;* that the *cestui que trusts* were the Conrad Hill Gold and Copper Company, and that that company attempted to join and merge itself into the North Carolina Mining Company by proceedings which were irregular and ineffectual for that purpose, and that the said North Carolina Mining Company conveyed to Sloan, etc.

It may be admitted, as contended by the plaintiff, that the deeds and proceedings relied on by the defendant, are irregular and ineffectual to pass the legal title, for if they had been ever so regular and formal they could not have passed the legal title. The legal title was in the plaintiff and not in the *cestui que trusts.* But what the defendant rightly insists upon is that the deeds and proceedings coupled with the facts that they were for value and were fair and *bona fide*, operate as assignments of the equitable interest of the *cestui que trusts;* and that having the possession of the land he is entitled to hold it.

There is no error.

PER CURIAM.—*Judgment affirmed.*

BICKEL'S APPEAL.

(86 Pennsylvania State, 204. Supreme Court, 1878.)

[1] **Resulting trust, how raised.** A resulting trust in land can be raised only from fraud in obtaining the title thereto, or from the payment of purchase money when that title is acquired.

Facts insufficient to raise a trust. In 1841 arbitrators appointed to settle a dispute between certain companies and O., in regard to the Phœnix tract of coal land, made an award to O. In 1842 O. assigned this award to P. as collateral security for a debt, P. to take his debt and pay the balance to O. In 1845 O. and P. entered into a written agreement to endeavor to purchase the Phœnix tract, and to divide the profits to arise therefrom. In 1846 P. purchased the lands, took title in his own name and continued in possession until his death, when his devisee took possession and remained therein until 1858. In 1856 the executor of P., in making the final payment for the tract, was credited with the amount of the above award. O. made no claim to any interest in the

[1] *Bayles* v. *Baxter*, 14 M. R. 561.

tract during the life of P., and not until some two years after the legal estate had passed to his devisee, and the executor had no knowledge of O.'s claim when he made the settlement. In 1869 O. filed a bill in equity against the executor of P. and the devisee for an account of a share of the profits of the tract. *Held*, that the devisee held the tract free from any trust for O.

[1] **Statute of Limitations, in equity.** The Statute of Limitations is applied with the same effect in a court of equity as in a court of law, although a bill in equity may have a much wider scope as to parties and the subjects embraced by it than a suit at law.

Idem—Complete adjudication in equity. A court of equity having obtained jurisdiction over the parties may settle every matter in dispute between them touching the controversy, near or remote, direct or collateral, yet it can not directly or indirectly reach beyond the statute.

Facts insufficient to prevent the bar of limitation. O. having a right of action against the executor of P., which arose in 1856, brought suit therefor in 1857. In 1867 O. and the devisee of P. executed an agreement, under the terms of which O., in 1868, discontinued the suit against the executor of P. In 1869 O. filed a bill in equity against the executor of P. and his devisee, asserting that this agreement was void because the devisee, who was a married woman, had not properly executed the same, and praying that the agreement might be set aside, and O. reinstated in all the rights he had surrendered thereunder. *Held*, that neither as to the executor nor the devisee did the action of 1857 toll the Statute of Limitations which thus began to run in 1856.

Appeal from the Court of Common Pleas No. 2, of Philadelphia County.

This cause originated in the old Court of Common Pleas, and in the distribution of the business in the reconstruction of the courts under the new constitution was allotted to the causes to be tried by Court of Common Pleas No. 2.

The proceedings were as follows: In 1869 John C. Offerman filed a bill in equity against Asa Packer, surviving executor of Robert W. Packer, deceased, and Rollin N. Rathbun and Helena, his wife, which, in substance, averred that in 1841 arbitrators were chosen to settle certain matters in dispute between complainant and the Camden and Amboy Railroad and the Delaware and Raritan Canal Companies, arising out of the purchase of the Phœnix Park tract of coal land; that said arbitrators made an award of $13,085 to complainant, and directed him to deliver up possession of said land to said companies, which was done; that on the 18th of February, 1842, complainant assigned said award to Robert W. Packer as col-

[1] *Lakin* v. *Sierra Buttes M. Co.*, 25 Fed. 327.

lateral security for a debt, Packer undertaking to collect the award and apply the proceeds to the payment of his debt, and pay over the balance to complainant; that subsequently, on the 17th of June, 1845, complainant and Packer entered into a written agreement to purchase for their joint account the Phœnix Park tract and adjacent coal lands, and to divide the profits to accrue therefrom. This agreement was as follows:

"It is agreed between John C. Offerman, of Pottsville, and Robert W. Packer, of Reading, Pa., that they jointly and severally agree to and endeavor to purchase the coal lands called the Phœnix Park tract, containing eight hundred acres, lying in Schuylkill County, on the West branch of the Schuylkill river, these lands belonging to the Camden and Amboy Railroad and Delaware and Raritan Canal Company, and it is understood that they divide the profit accruing out of the said lands. It is also agreed that Offerman and Packer look out for a person to help make the first payment on the lands, and should we agree to renew the Offerman Railroad and Mining Company, or do otherwise, it is agreed that Offerman shall give one fourth of his interest to the said Packer for considerations Packer signed to the said Offerman, some time hence, in the award Offerman obtained by arbitrators, in Schuylkill County, in 1841, against the Camden and Amboy Railroad and Delaware and Raritan Canal Company.

(Attested) "JOHN C. OFFERMAN,
"R. W. PACKER."

The bill then further averred that on the 30th of May, 1846, Packer entered into articles of agreement with parties representing the aforesaid companies, agreeing to pay $81,300 for said lands, the times of payment and the amounts being therein stipulated; that said purchase was made in pursuance of the agreement between complainant and Packer in June, 1845, and that Packer took possession of the lands for their mutual advantage and profit; that Packer died in October, 1848, having made his will, which was proved in Berks County, whereby he devised said Phœnix Park tract to his daughter, Helena, intermarried with Rollin N. Rathbun, and appointed Asa Packer one of his executors; that at the time of his death Robert W. Packer had not received a conveyance of the land, and had paid but a small portion of the pur-

chase money, and that from the income of the land; that in 1850, $66,000 of the principal, with interest, were still due; that neither Packer nor his heirs ever paid any of the purchase money, except from the profits accruing from the lands, and the amount credited said Packer by said companies on the award in favor of complainant; that in 1856, Asa Packer, surviving executor of Robert W. Packer, made a final settlement with the Camden and Amboy Railroad, and a conveyance of the land was then executed to Helena Rathbun, and that in said settlement, as part consideration therefor, the estate of Robert W. Packer was credited with the award of arbitrators of February, 1841, and that said settlement was made without notice to or knowledge of complainant; that Rathbun and wife conveyed said lands to a mining company for $300,000; that neither Packer, during his life, nor Rathbun and his wife, nor the executors, having accounted to complainant for the amount of said award or for the profits and value of the one half of said tract of land, complainant applied for relief to the Orphans' Court of Berks County, when issues were framed and sent for trial to the Court of Common Pleas of said county to ascertain the facts; that while said issues were pending, on January 30, 1867, complainant was induced to sign an agreement between himself and said Helena Rathbun and her husband, whereby complainant agreed to surrender, without any consideration whatever, the agreement between Packer and complainant of June 17, 1845, as to said tract of land, and to discontinue all suits then pending against Rathbun and wife and Asa Packer, executor, and to refer all matters arising under the award of arbitrators to A. G. Green, Esq., whose award was to be final; that said agreement of 1867 is null and void, because it was signed by R. N. Rathbun "for self and wife," and was never signed and acknowledged by said wife; that on April 3, 1867, complainant notified the parties interested and the referee that he repudiated said agreement, and would not abide by the report of the referee, nor be bound by any acts of his attorney in the premises; that nevertheless said referee proceeded to consider the case, and awarded complainant the sum of $3,195.96, and complainant's attorney, on July 8, 1868, discontinued his suit against the estate of Packer, commenced March 17, 1857, for the

amount due him out of the award of arbitrators assigned to Packer; that said amount is entirely insufficient to pay the indebtedness of said Robert W. Packer and those claiming under him to complainant, and that he has refused to accept the same or recognize the authority of the referee. The bill then prayed:

1. That the agreement of 1867 might be declared void and complainant reinstated to the rights he may have had prior to entering into the same.

2. That defendants be ordered to restore to complainant the agreement of June 17, 1845, between complainant and the said Robert W. Packer, which was surrendered under said agreement of compromise of January 30, 1867.

3. That defendants be decreed to account to complainant for one half of the profits which accrued yearly from said land, and for one half of the profit on the sale thereof.

4. That the defendants be decreed to account for such sum or sums of money as they, or the said Robert W. Packer in his lifetime, received for your orator.

The answer of Asa Packer sets forth that he was discharged as executor, by the Orphans' Court of Berks County, on the 30th of January, 1865, and that since that time he had had no connection with nor knowledge of the estate. The answer of Rathbun and his wife admitted the purchase of the lands in dispute on the 30th of May, 1846, and averred that said Packer entered into exclusive possession thereof and retained said possession in his own name, and under claim of title in his own right, until his death, in 1848, and that thereafter his daughter Helena, as his devisee, entered and remained in possession, and that no demand was made upon her for a share of the profits until long after the legal title had been conveyed to her in 1856. It denied that Packer made the purchase in pursuance of the agreement of 1845, or that he took possession for their joint benefit, or that any money was contributed by complainant toward the purchase, and averred that the settlement of 1856, in which the award of 1871 was accredited to R. W. Packer's estate, was made without the knowledge of complainant, without any knowledge on the part of the executors that complainant had any such claim upon the award, and that said claim was not made upon them until after said settlement; that complainant being indebted

to the estate of said R. W. Packer, in an amount larger than that realized from the award, the executor refused to pay any money on account of said award, when plaintiff brought suit therefor in the District Court of Philadelphia, to March term, 1857, against Asa Packer, executor, and in 1858 another suit at *Nisi Prius* against Asa Packer individually, for the same cause of action, in which last suit complainant was nonsuited in 1860; that under the agreement of 1867, the action of 1857 was discontinued on July 8, 1868. The answer also suggested that whatever claim complainant might have had against the executors of Packer, for the award of 1841, it was barred by the Statute of Limitations, which had begun to run in 1856, at the time of the settlement.

William J. McElroy, Esq., the master to whom the cause was referred, reported, *inter alia*, as follows:

"The conclusion which I have arrived at, on a careful consideration of the facts in evidence, is, that Mr. Packer did not purchase these lands in pursuance of the agreement of 1845, but in his own right; that Mr. Offerman, judging him by his own words and conduct, so understood the purchase; and that there was no express trust of the lands, or any portion of them or their proceeds, in favor of Offerman.

"It is to be observed, also, that neither the executor nor Mrs. Rathbun, when the purchase money was settled and the legal title conveyed to her in 1856, knew that Offerman had any interest in the award. All they then knew was that he had assigned it absolutely to Packer by a formal paper executed in 1842. So that they were not knowingly using Offerman's money in paying for the lands, but that which they believed to be a part of Packer's estate. And this they had a right to infer, for Offerman had so declared in writing, and up to this time had not warned them that it was not so. Even if they had known all the facts, there was no trust, as respects the money due on the award, which would entitle the owner of it to follow it into the land and claim the land in place of the money. Nor could an executor, by using trust funds to pay purchase money due by his testator, create a resulting trust in favor of the owner of the money, for that would enable him, by his own misconduct, to change the title of his testator's lands. Offerman, however, never made any such claim,

but asserted his right to the money, and sued for its recovery. In addition to this, if, by the use or application of this money, in any way, a trust arose by implication of law, it was, long before the filing of this bill, barred by the statute.

"I therefore report that there has been no trust, express or implied, of these lands or their proceeds, established in favor of the plaintiff, John C. Offerman, and that he is not entitled to an account of the profits of the lands."

He further reported: "With regard to the effect of the Statute of Limitations, it would seem that the complainant's right accrued as soon as he knew that the award had been collected, and the statute then began to run. This could not have been earlier than 1856, and this is the period fixed by the answer as the time when the defendants used the award in their settlement with the railroad company. On the 17th of March, 1857, Mr. Offerman brought suit against the surviving executor for the amount due him out of the award. On the 10th December, 1857, he brought another suit on the same claim. In 1863 he presented this claim before the auditor of the accounts of the surviving executor, filed in Berks county. The proceedings in Berks county were terminated by the compromise of 1867, hereinbefore mentioned. The suit of December, 1857, terminated by a nonsuit on 12th April, 1860. The suit of March, 1857, in the District Court of Philadelphia County, was still pending until discontinued by Mr. Seitzinger, as attorney for plaintiff, on July 8, 1868. This discontinuance was undoubtedly entered under the agreement of compromise of 1867, and as that agreement has been decided to be invalid, whatever was done under it must fall with it. That suit in the district court must, therefore, be considered here as still subsisting, and its discontinuance can have no effect adversely to the plaintiff's claim. But the prosecution of the suit having been stopped by the compromise, the plaintiff was obliged to come into a court of equity to have that avoided and to be reinstated in his rights as they existed previously thereto. It appears to me that he is not chargeable with *laches* in the prosecution of this claim, and that having had his suit at law, which was clearly commenced in time, stopped by a discontinuance based on an invalid agreement, he is not to be turned out of this court, to which he was compelled to resort, by a plea that the Statute of Limita-

tions has been running against him all the time that he was endeavoring to prosecute his claim, and has let down its bar against him by reason of an act done without his consent and against his protest that he would not be bound by it.

"I therefore report that the plaintiff is not, so far as the claim now under consideration is concerned, debarred from prosecuting it by reason of the time elapsed since his right accrued. And my conclusion on the whole case is, that the third prayer of the plaintiff's bill should be refused; that the first and second prayers should be granted, and that under the fourth prayer the defendants should account to the plaintiff as above stated."

The complainant excepted to this report, because the master recommended the refusal of his third prayer, and the respondents, because he recommended that the first and second prayers of the bill should be granted. The Court of Common Pleas, No. 2, dismissed the complainant's exceptions, and sustained those of respondents, and dismissed the bill, which action, *inter alia*, was assigned for error by John M. Bickel and E. W. Offerman, who, it appeared, had become vested with complainant's rights, were placed upon the record by the proper amendments to the bill, and who took this appeal.

HENRY C. TITUS, for appellants.

R. C. MCMURTRIE, for appellees.

Mr. Justice GORDON delivered the opinion of the court.

A resulting trust in land can be raised only from fraud in obtaining title thereto, or from the payment of purchase money when that title is acquired: *Barnet* v. *Dougherty*, 8 Casey, 371. Offerman has failed to bring his case within the reach of either of these rules. That R. W. Packer used any trick, concealment or underhand means in procuring the contract from the Camden and Amboy Railroad Company, is, so far as we can discover, not even alleged, and that Offerman paid the purchase money, or any part thereof, which procured or helped to procure that contract, is not proved. It is urged that the alleged trust had its origin in the agreement between Offerman and Packer, dated June 17, 1845. That, however,

was not a definite contract to purchase, but only an agreement to endeavor so to do, and this seems to have been based upon the further condition that they could find some one or more persons who would help them to make the first payment of purchase money. There is, however, no evidence that any such person or persons were ever found, or that there was any further attempt to carry this contract into execution; neither was there the payment of a dollar of money upon it, nor even a covenant therein for the payment of money. Had it been intended to apply the proceeds of the award against the Camden and Amboy Railroad Company and Delaware and Raritan Canal Company, or any part thereof, to this contemplated purchase, such intent would surely have appeared, for that award is mentioned in the agreement, but only to state that Offerman had assigned one fourth part thereof to Packer, "for considerations Packer signed to said Offerman some time hence." The presumption, then, of any such application, being thus rebutted, it does not matter that some nine years after this time and after Packer's death, when the legal title came to be conveyed to the devisee, this award was applied as a credit on the purchase money still due the company, for not only was this long after the acquisition of the equitable title by Packer, but it was not so applied with Offerman's assent, or as his property, but as the property of the estate. Moreover, this claim on part of the plaintiff is obviously an afterthought. Packer bought and entered into the actual and exclusive possession of the land in 1846, and was recognized by Offerman, in the most unequivocal manner as the owner thereof. He made no claim to any interest therein during Packer's life, nor until some one or two years after the legal estate had passed by deed to Mrs. Rathbun. Clearly no trust of any kind can be raised on such a state of facts, and we need pursue this branch of the case no farther.

The question next to be considered arises on the Statute of Limitations, as affecting the plaintiff's claim against the estate for the amount of the proceeds of the award above stated. This award, amounting to the sum of $13,085.20, was rendered February 11, 1841; it was assigned to Packer February 18, 1842, he at the same time agreeing to collect the same, and after deducting his own debt, pay over the balance to Offerman. As we have seen, this award was settled with the Cam-

den and Amboy Railroad Company by Packer's executor in 1856; we may therefore set it down as a fact, as the auditor has done, that from this last-recited date the statute commenced to run, and unless tolled by suit, or some other act of the parties, it would operate as a bar some time in 1862. On the 17th of March, 1857, Offerman brought suit on this claim against Packer's executor, in which a discontinuance was entered July 8, 1868. On the 10th day of December, 1857, a second suit was brought in the District Court of Philadelphia County, against the same party and for the same claim, on which a nonsuit was suffered April 12, 1860. Last of all, this bill was preferred some time in 1869. In all this there is nothing to release the grasp of the statute; this, however, is accomplished by the learned auditor in the manner following: Certain suits had been brought in the Common Pleas of Berks County, to August term, 1865, by Offerman, against Rathbun and wife. By an agreement, dated January 30, 1867, it was agreed that Offerman should surrender, for cancellation, the paper of June 17, 1845, and release all claims and demands whatsoever against the defendants and the estate of R. W. Packer, saving and excepting only that arising from the contract respecting the award against the railroad and canal companies, and it was further stipulated that the amount due the plaintiff on this claim should be settled and adjusted by an arbiter in the agreement named and appointed. It was also provided in the instrument just mentioned, that the Berks county suits, should be marked settled, and the case pending in the district court, of March term, 1857, against Asa Packer, as executor of R. W. Packer's estate, should be discontinued. On the 3d of the following April, Offerman having become dissatisfied with the agreement of the 30th of January, 1867, gave formal notice of his repudiation thereof, and of his revocation of the submission. Now, the master having found that the agreement above mentioned was void, because not properly executed by Mrs. Rathbun, a *feme covert*, came to the conclusion that, as the suit of March, 1857 was, as he says, undoubtedly discontinued by Mr. Seitzinger, the plaintiff's attorney, under and in pursuance of the agreement, the revocation restored the parties to their original status, rendered the discontinuance inoperative, and reinstated the suit of March, 1857, and by this means Offerman's claim was kept alive and the statute

tolled. Admitting the facts to be as assumed, we nevertheless can not admit the legal conclusion drawn from them. As we have seen, the suit of March, 1857, was against Asa Packer as surviving executor; the present action is brought against this same person, E. P. Wilbur, administrator of Rollin N. Rathbun and Helena Rathbun, and the decree reported by the master is against Packer and Helena Rathbun. But by what process of reasoning is the action of March, 1857, made to toll the statute as to Mrs. Rathbun? It is urged, however, that, though as to her the statute may be operative, it may nevertheless be tolled as to the executor, by virtue of that suit; in other words, as to him, this bill may be made to stand on the foot of the action of 1857. Let us examine this proposition. We observe, in the first place, that without some extrinsic support, this bill must fall, for, according to *Hamilton* v. *Hamilton*, 6 Harris 20, the Statute of Limitations is applied with the same effect in a court of equity as in a court of law. Such being the case, though a bill may have a much wider scope, as to parties and the subjects embraced by it, than a suit at law, yet it has no greater force as to the statute. A court of equity having obtained jurisdiction over the parties, may settle every subject in dispute between them, touching the controversy, near or remote, direct or collateral, but can not directly or indirectly reach beyond the statute. But an account is brought into this bill, which, counting from the date thereof, is barred by the statute. How can this apparently insuperable difficulty be overcome? The answer is, by the action of 1857; as that suit was begun within the six years, it is said it prevents the running of the statute. No doubt this is correct so far as the claim is involved in and pursued through that suit, but it can not impart its vigor to any other suit. This is expressly ruled in *Magaw* v. *Clark*, 6 Watts, 528. In this case the original suit was against Clark & Shryock, in the year 1825, and service of summons was had on Shryock only. In 1830 an alias was issued and served on both, and the *narr.* and other pleadings were filed as of the suit on this second writ. On demurrer, held, that the Statute of Limitations was a bar as to both defendants, notwithstanding the former suit. The decision is put upon the ground that the alias writ having been issued against both

Shryock and Clark, and having been served on both, it was in fact a new suit, and not the continuance of the former one, hence was not effective to keep the former alive. It will be observed that thus it was that the alias failed even as to Shryock, who had been served with the original. So also it was said in the case of *Wann* v. *Pattengale*, 2 Harris, 313, that whatever difficulty might intervene in carrying forward the original suit, the institution of a new and distinct action could not be so connected with the old as, by the use of both, to count back within the period of limitation. This, however, is exactly what is attempted in the present case, under the name of equity; the effort is to engraft this bill upon the action of 1857, so as to give it a power which otherwise it would not have. It matters not that the suit was in full life when the bill was filed, for, in *Magaw* v. *Clark*, the alias was of course issued pending the former action; but this bill is certainly quite as much a new suit as was the second summons in that case. Nor can we see where the peculiar equity powers are, which enable a bill to overstride a clear rule of law and attach itself to an action with which it is in nowise connected, except through the claim involved in it. Surely, equity can not thus overreach the statute, when, as to the statute, a bill is governed by the same rules as a suit at law. Yet it is gravely argued we may begin to count back, in order to reach the statutory period, not from the date of the bill, but from the date of a suit commenced some nine years before. Conceding that if the claim were of such a character that the statute would not operate upon it, it might be settled in this suit, yet if it were so settled it would be wholly independent of the action in the district court. It would be the claim itself and not the suit that equity would consider; so far as that suit was concerned, it would be treated as though it did not exist. For what other purpose, then, is that case now brought into this action than to tide this bill over the bar of the statute? Taking up the claim and counting from the date of the bill, and it is found the statute has run, the plaintiff's case is at an end; but the master, in his desire to do what he considers justice, goes back some nine years and discovers a suit at law involving this claim, and he concludes that, as equity has large powers and powers that may be extended to

the last degree, he will graft his bill upon that suit and thus forestall the statute. This can not be; it is equity run mad.

In this we concede, as of course, what no one doubts, that had the plaintiffs, by the machination or fraud of Packer's representatives, been induced to defer their claim beyond the statutory period, equity would interfere to prevent the intervention of the statute; but as there is neither proof nor allegation of any such fraud, there is no room for equitable interference on that ground.

So, in like manner, whilst we are not prepared to indorse the finding of the learned master that the *non pros.* of 1868 was entered by the attorney of Bickel and Offerman, in fraud of their rights, yet conceding the accuracy of that finding, it was, nevertheless, a fraud in which the defendants were no way involved; it was a fraud committed by the plaintiff's own agent, and one which, by no possibility, can be set up against the defendants.

Treating the *non pros.*, however, as of no effect, and this is all the plaintiffs can ask, it but follows that a recovery may be had upon any claim set forth in the action of 1857, not older than six years, counting from the *teste* of the writ. That this count can be made backward from 1857, is due to the fact that that action had its origin in that year; but as it can not communicate this date to any subsequent suit, either at law or in equity, so neither can it communicate a power which it possesses only by virtue of that date.

Decree affirmed. Costs to be paid by appellants.

Chief Justice AGNEW filed a dissenting opinion.

GREENWOOD'S APPEAL.

(92 Pennsylvania State, 181. Supreme Court, 1879.)

[1] **Trustee not liable for highest passing price.** A trustee *ex maleficio* when he has acted in good faith is not liable to account for what he might have received on the sale of oil but for what he actually has received.

Idem—Basis of accounting. In the absence of fraud or bad faith in the sales the true basis of accounting was the actual sales.

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[1] *Boylan* v. *Huguet*, 14 M. R. 503.

Appeal from the Court of Common Pleas of Butler County.

Bill in equity filed by G. G. B. Greenwood, assignee of John T. Perdue, against George S. Long and Mary Ann Long, his wife, by amendment, Mrs. Malinda H. Pennock and Horace A. Pennock, her husband.

The account to be taken and stated in this case was of the production of two oil wells, being No. 1 and No. 2, on a lease taken in the name of John T. Perdue, consisting of eight and one fourth acres on the Widow Smith farm in Fairview township, Butler county, of the one half interest in which he was held to be a trustee for Mrs. Mary Ann Long, for her assigns, by a decree of the Supreme Court of this State, made on the 8th of January, 1877, (see *Long* v. *Perdue*, 2 Norris, 214,) as well as of the cost and necessary and proper expenses of putting down and operating said wells. After said decree an arrangement was made between the parties by which the plaintiffs have been receiving their proportion of the proceeds of said leasehold, so that the account to be taken by the master ended at the date of January 8, 1877, as to the production.

The case was referred to a master who took testimony, and after argument made a report, wherein he, *inter alia* said:

"The learned counsel who argued the case on part of plaintiffs before the master, contended that the defendant having been found and declared a trustee *ex maleficio* for plaintiffs, should be charged with the highest price per barrel for the oil that oil reached at any time between the time of its production and the accounting for it, and cited in support of his argument *Bank of Montgomery* v. *Reese*, 2 Casey, 147; *Backenstoss* v. *Stahler*, 9 Id. 251; *Robinett's App.*, 12 Id. 189; *Hill* v. *Canfield*, 6 P. F. Smith, 459; *Persch* v. *Quiggle*, 7 Id. 255; *Neiler* v. *Kelley*, 19 Id. 408; Annual U. S. Dig. 1850, 417, Sec. 38, and case of *Schley* v. *Lyon*, 6 Ga. 530, there cited; also *Freeman* v. *Cook*, 6 Ired. Eq. 373; *Jenkins* v. *McConico*, 26 Ala. 212; *Keisel* v. *Earnest*, 9 Harris, 90, and Sedgwick on Meas. Dam., § 475, etc.

"On the other hand it was contended on the part of the defendant, that he should only be charged with the prices received by him for the oils sold, and interest thereon, after deducting credits to which he is entitled; the proof being

that he had sold the oil in good faith for the best prices he could get in the market at the dates of his several sales as reported.

"The plaintiffs having disputed the prices reported by defendant, it was agreed that the master should go with the parties, or their solicitors, to Oil City, and take such testimony as might there be offered on part of plaintiffs as to the market price of oil on the several days on which defendant alleged he had made sales of oil. This was done and the quotations of the 'Oil City Derrick,' of the highest and lowest prices of oil sold on the dates mentioned, with the testimony of witnesses as to the correctness of those quotations, were taken and are found with the other testimony herewith returned. Afterward upon the plaintiffs' theory of the case, and at their request, it was agreed that the master should return to Oil City, and take from the files of the 'Oil City Derrick,' the quotations of the highest and lowest prices of oil per barrel for each and every day from December 12, 1872, until January 8, 1877, which he did, and said quotations are returned with the testimony herein. * * *

"After careful consideration of the testimony and proofs the master has concluded that a just and proper measure of damages in this case will be adopted by charging the defendant with the highest market value of each run of oil on the day it is run, and interest from such date. The prices are obtained from the quotation from the 'Oil City Derrick,' and are the prices that the master was satisfied do not include pipeage."

Exceptions were filed to this report, which the court, McJUNKIN, P. J., overruled when defendant took this writ, and, *inter alia*, made the following assignments of error.

2d. The court erred in overruling the defendant's second exception to the report of the master, which was as follows:

The master erred in adopting as the measure of damages the highest price at which oil was sold on the day that each run of oil was made from the wells into the pipe line. The price of the oil should have been fixed or charged to the defendant at the price he actually received, which is fully shown by the testimony, with interest from that date, after deducting proper credits.

3d. The court erred in overruling the defendant's third exception to the report of the master, which was as follows:

The master erred in receiving as testimony and basing his conclusion upon quotations of prices from the "Oil City Derrick," of oil for each day for the time oil was run from these wells, as the evidence was objected to, and incompetent and unreliable. This and any other testimony taken by the master was not such evidence as he could, with reasonable certainty, find the highest and lowest prices of oil on the days mentioned. The master states "the prices are obtained from the quotations from the 'Oil City Derrick,'" in all of which he erred. The defendant should have been charged alone for the price which he received for the oil.

27th. The court erred in continuing to exercise jurisdiction, make orders and decrees in this case after the appellant, John T. Perdue, was declared a bankrupt, to wit, December 11, 1877.

THOMPSON & SCOTT, for appellant.

S. F. BOWSER, for appellees.

Mr. Justice PAXSON delivered the opinion of the court.

There are twenty-seven assignments of error in this case. Most of them relate to questions of fact, and may be at once dismissed, as the evidence is not before us. There are enough left, however, to enable us to review to some extent the principles upon which the case was decided by the master and the court below.

The liability of John T. Perdue to account to Mrs. Long was settled in *Long* v. *Perdue*, 2 Norris, 214. It was there held that the denial of Mrs. Long's right by Mr. Perdue made him a trustee *ex maleficio*, not from the time of the denial but from the date of the original agreement, and that he must account to her for the proceeds of the well. An account was accordingly decreed by the court below, and a master appointed for that purpose. The defendant appeared before the master and furnished an account of the actual sales of the oil, and claimed credit for certain items of costs and expenses. The

master rejected the defendant's account of sales so far as prices are concerned, and adopted an arbitrary rule for fixing the value of the oil. This will appear from the following extract from his report: "After careful consideration of the testimony and proofs, and much study, the master has concluded that a just and proper measure of damages in this case will be adopted by charging the defendant with the highest market value of each run of oil on the day of its run, and interest from such date." The case was disposed of by the master and the court below, upon the theory that the defendant, being a trustee *ex maleficio*, was liable to account, not for what he received for the oil, but for what he might have received for it. No authority was cited for this proposition, except those referred to by the plaintiff's counsel before the master, and which do not apply. They were cases of technical trusts, or of the conversion of stocks deliverable upon a particular day. The distinction between such cases and the one in hand is manifest. The defendant was lawfully operating a well in which he had a joint interest with the plaintiff. It was his duty, as settled by the former decree of this court, to account to plaintiff for the proceeds of half the oil. Under such circumstances there is no rule of law or equity which would make him responsible for the highest market price of the oil upon the days on which it was turned into the pipe lines. In the absence of fraud or bad faith in the sales, neither of which is pretended, the true measure of damages would be the actual sales. The oil market, as is well known, is fluctuating and at times experiences violent changes. Upon the day when the plaintiff turned the oil into the pipe lines, he may have been unable to sell, or he may have had reasons to anticipate a rising market.' Nor do we attach importance to the fact found by the master, that defendant owned other wells and produced other oil, which was also run into the tanks and pipe lines, and made other sales upon other days and at different prices. Such facts, if conceded, have no bearing upon the sales of this particular oil.

We are of opinion that the rule laid down for the measure of damages was erroneous. As there was no bad faith shown, the defendant should have been charged only with what he received for the oil.

persons who were stockholders in the company and others, they constituted the defendants their trustees to administer it according to a precise plan, and Cook was appointed their agent to carry it out. He was sent to Utah with explicit instructions, the general purport of which was to negotiate with the Utah creditors, to whom the floating debt was owing, for the purchase of their debts, if they could be bought for a specified part of the subscribed sum. The money by this plan, and these instructions, was to be invested in these debts, as a present security to the subscribers, until the plan should be so far worked out that the other and ultimate security by a second series of debentures and a trust deed could be made.

Their agent paid out all the money in purchasing one secured debt on which the company's mine had been sold, in satisfying others unsecured, and in sundry expenses, and working the mine; and he made the promises sued on in respect to other debts, which the subscribed fund was not adequate to pay or purchase.

An examination of the powers of attorney satisfies us that all the operations of Cook in Utah, touching the local debts of the company, must be attributed to the agency he assumed, and for a different line of conduct possessed for the defendants as trustees of the subscribed fund. He had no power whatever from the defendants as trustees of the debenture creditors to deal with the creditors of the company in Utah for any purpose. And as agent for the investment of the subscribed fund, he had no power or authority to make the contracts in question.

The trust only embraced the fund subscribed, and as trustees they could neither make, nor authorize to be made, any valid contract for the payment of an additional sum. Nor for any action in excess of Cook's or their own authority, under color of one power of attorney or trust, could the defendants be made liable in their other fiduciary capacity.

As this view disposes of the cases, it is not necessary to consider the other questions which were discussed.

Judgment reversed, with costs.

BOREMAN, J., concurred; SCHAEFER, C. J., dissented.

1. The relationship of trust implied between principal and agent, and between corporation and its officers: *Cumberland Co.* v. *Parish*, 1 M. R. 423; *Cumberland Co.* v. *Sherman*, Id. 322.

2. But such trust relationship does not exist between its officers *inter se: Gillett* v. *Bowen*, 23 Fed. 625.

3. Postponement of sale of colliery by residuary trustee, who was also a beneficiary, to the prejudice of another beneficiary: *Lord* v. *Wightwick*, 4 DeG., M. & G. 803; 6 H. L. Cases, 217; 1 Drew, 576.

4. Sale of land and receipt of whole price by one tenant in common does not make him a trustee for his co-tenant, as such sale does not divest title except to vendor's own share: *Milton* v. *Hogue*, 4 Ired. Eq. 415.

5. Trustee purchasing for his own benefit estates intrusted to him to sell for payment of debts, and afterward selling at advanced price, decreed to be trustee for the original vendor as to the profits: *Fox* v. *Mackreth*, 2 Brown's Ch. Cases, 400; see *Harts* v. *Brown*, 4 M. R. 1.

6. Conveyance absolute on its face when construed to be a mortgage: *Blackwell* v. *Overby*, 10 M. R. 531.

7. Powers of trustee holding legal title, who is also agent for the real owner: *Preston* v. *Stuart*, 29 Grat. 289.

8. A had an equity to a fraction in a mine; this equity he conveyed. Afterward he, A, had a deed made to his wife from the holder of the legal title. She knew of the deed to B. *Held*, that the wife must convey to the party holding the deed from A: *Crawford* v. *Moore*, 28 Fed. 824.

9. A resulting trust is limited to the amount advanced; it is not based upon the value of the purchase: *Olcott* v. *Bynum*, 17 Wall. 44.

10. A contract, by which a trustee agrees to resign for a consideration, is against good morals and void: *Forbes* v. *McDonald*, 54 Cal. 98.

11. The ratification by a *cestui que trust* is not binding except when made with full knowledge of the facts, and of his rights under the facts: *Adair* v. *Brimmer*, 5 M. R. 683.

12. An agent buying in an outstanding title, holds it in trust for his principal: *Hardenbergh* v. *Bacon*, 1 M. R. 352.

13. One who wrongfully obtains the legal title to land which belongs to another, whether acting in good faith or not, is held a trustee for the equitable owner: *Lakin* v. *Sierra Buttes M. Co.*, 25 Fed. 337.

14. Effect of the word "trustee" in stock certificate: *Thompson* v. *Toland*, 2 M. R. 77; *Shaw* v. *Spencer*, 100 Mass. 382.

15. Party acting as agent of corporation is not estopped to deny the trusteeship when he was not appointed by the corporation: *Kelly* v. *Ruble*, 3 West C. R. 737; 11 Or. 75.

16. Party who denies a trust can not claim an accounting: *Irvine* v. *Dunham*, 111 U. S. 327.

17. *Cestui que trust* bound by the contracts and compromises of the holder of the legal title: *Stonecifer* v. *Yellow Jacket Co.*, 3 M. R. 4.

18. Where a manager of a mine held by himself and others, prospected upon and purchased adjoining ground, he can not, from these facts, be presumed to have bought for the joint benefit of all owners: *Pierce* v. *Pierce*, 21 N. W. 81; 55 Mich. 629.

THE CORNING TUNNEL AND MINING COMPANY v. PELL ET AL.

(4 Colorado, 507. Supreme Court, 1878.)

[1] **Right to veins intersected dependent on discovery.** The right to possession of lodes granted by section four of the act of Congress of May 10, 1872, to tunnel owners, is dependent, among other things, upon *discovery* of the lode in the tunnel. The effect of section two of the act is to give a party running a tunnel for any purpose, whether for prospecting or development, the right to locate any lode not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

The "line of the tunnel" does not mean the entire width and length of the surveyed tunnel site, nor does the act provide for or authorize a tunnel site survey and location fifteen hundred feet in width. The policy of the government has been to prevent monopoly of its mineral lands, or its ownership in large tracts.

The "line" of the tunnel, having reference to the subject it was intended to describe, designates a width marked by the exterior lines or sides of the tunnel.

Appeal from District Court of Arapahoe County.

The facts are sufficiently stated in the opinion.

J. B. BELFORD and CLINTON REED, for appellant.

H. M. & W. TELLER and G. B. REED, for appellees.

ELBERT, J.

In November, 1875, the appellees made application, under the law, for a patent to the Slide lode. The appellant filed an adverse claim, and brought ejectment into the District Court for the County of Boulder, to determine the title. A change of venue was taken to the District Court for the County of Arapahoe, where a trial was had to the court, and, on motion of appellees, a judgment of nonsuit was entered.

The appellant claims, by virtue of its tunnel site location, made September 18, 1872, under the act of Congress of

[1] *Gray* v. *Truby*, 6 Colo. 278; *Pelican Co.* v. *Snodgrass*, 9 Colo. 339.

May 10, 1872, and by virtue of the work done in and upon its tunnel. This tunnel site, as claimed, may be described generally as extending along a center line running from the face of the tunnel 3,000 feet, with side lines parallel with the center line, and each 750 feet from it, making a parallelogram 1,500 x 3,000 feet.

The tunnel appears to have been worked with reasonable diligence, and never to have been abandoned.

The appellees claim under the same act, by virtue of discovery, development and location. The location was made in August, 1875, and the appellees have been in continuous possession ever since claiming title thereto.

The Slide lode is 1,500 feet in length and crosses the center line of the tunnel site nearly at right angles. The discovery shaft is near but not on the center line, being about fifty-five feet therefrom.

The evidence does not show, nor was there any attempt to show, that the Slide lode had been reached or cut by the tunnel; nor is there any claim that the appellant ever located or pre-empted it, or ever had actual possession of it. Its claim is based entirely upon the right of tunnel owners under section 4 of the act of Congress mentioned. The section is as follows:

"That when any tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnels shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

The rights of possession of veins or lodes here granted to the tunnel owner is dependent, among other things, upon *discovery* of the vein or lode in the tunnel. Such is the force and effect of the language of the section. "The owners of such tunnel shall

have the right of possession of all veins or lodes * * * *discovered in such tunnel*," and "to the same extent as if discovered upon the surface."

The purpose of the section as of the entire act, was to fix the rights and reward the labors of the discoverer. The same purpose is manifest and the same rule prescribed with regard to surface claims in Sec. 2 of the act, in the provision that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The effect of the section is to give a party running a tunnel for any purpose, whether for development or for prospecting, the right to pre-empt and locate any and all lodes not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

The right of possession being dependent upon discovery in the tunnel, it follows that it could not attach prior to discovery, and that the appellant, therefore, had no right of action, unless by reason of the location of the Slide lode upon the line of its tunnel, if such was the fact. The right of the tunnel owner to the possession of the "line of his tunnel," as well as the extent of this right, are independent questions.

It is claimed that the location of the Slide lode is on the line of the appellant's tunnel, and that for the line of its tunnel, as well as for all blind lodes therein not previously known to exist, ejectment lies at any time after commencement of work on the tunnel.

The argument is founded upon the provision that "locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid."

The "line of the tunnel," it is insisted, as here used, means the entire width and length of the surveyed tunnel site—in this case 1,500 x 3,000 feet; that within these limits after the commencement of the tunnel, and while it is prosecuted with reasonable diligence, no valid location can be made of a vein or lode not appearing upon the surface. In the first place this section does not provide for, or authorize, nor do we know of any law that provides for or authorizes, a tunnel site, survey and location, 1,500 feet in width.

In the second place the results of such a construction as is contended for by appellants forbid its adoption, unless the language clearly indicates such to have been the legislative will. In this case the tunnel site location would withdraw from the explorations of prospectors over 100 acres of mineral lands. A very limited number of such locations would cover and monopolize in most cases an entire mining district, giving to a few tunnel owners all its mines, not upon the condition of discovery and development, but upon the easy condition of a commencement of work on the tunnel, and its prosecution with reasonable diligence.

The policy of the general government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. But for the existence of this policy there was but little or no reason for an abandonment of its system of surveys and pre-emptions applicable to agricultural lands, and the adoption as to its mineral lands of a system that as to surface claims at least, limits mining locations to an inconsiderable acreage, appendant to a discovered lode. The construction claimed is in contravention of this policy, nor can it be justified by the language of the section. Line, as a term of surveying, is that which has length without breadth, but as used in this section, having reference to the subject it was intended to describe, we think it designates a width marked by the exterior lines or sides of the tunnel. A greater width than this it can not be fairly said to imply. The line of the tunnel being the width of the tunnel, the location (in the sense that it is here used, of initial point of location or discovery shaft) of the Slide lode was not on the line of the appellant's tunnel.

What the appellant's rights would have been had this fact been otherwise, it is not necessary to determine. The location not being on the line of the tunnel, it is immaterial whether the lode appeared upon the surface or not, as in either case the evidence did not show any right upon the part of the appellant.

The judgment of the court below is affirmed with costs.

Affirmed.

McANDREWS v. TIPPETT.

(39 New Jersey Law, 105. Court of Errors and Appeals, 1876.)

[1]**Tunnel contractor ousted under time clause, by pretense of slow work —Measure of recovery.** By agreement under seal plaintiff agreed to sink shaft No. 4 on the Morris and Essex Tunnel and to drive the headings from the shaft to meet other headings from the other shafts. Defendant was to furnish cars. It was agreed that if the work was not done to the satisfaction of the engineer, defendant might take possession and complete the work. Defendant did take possession under this clause, and plaintiff sued as for a tortious entry.

Plaintiff having produced evidence tending to prove bad faith on the part of the defendant, the court charged that if defendant, by unreasonably withholding the cars, caused the delay or designedly embarrassed plaintiff in his work, and procured the engineer's action merely to get possession, etc., then the plaintiff should recover; that the clause as to furnishing cars, did not mean that defendant should furnish only such as might meet his whim, but as many as he could without inconvenience to himself in meeting the reasonable demands of the work as a whole; and that plaintiff, if entitled to recover at all, was entitled to recover as damages all the profit which would have resulted from completion of the work. *Held:*

1. That there was no error in the charge.
2. That the form of action was misconceived, and should have been upon the contract under seal; but by statute it was such error as did not defeat a recovery had on the merits.
3. That damages arising after the suit was brought were proper to be allowed by the jury.

In error to the Supreme Court.

For the plaintiff in error, VANATTA, Attorney General.

For the defendant in error, JOHN LINN.

The opinion of the court was delivered by WOODHULL, J.

The declaration in this case recites that, by a certain agreement between the plaintiff and the defendant, the plaintiff agreed to sink shaft No. 4, on the Morris and Essex tunnel, in the construction of which the defendant below, McAndrews, was the contractor, at a point to be designated by

[1] *Monroe* v. *North Pac. M. Co.*, 2 M. R. 652; *Verzan* v. *McGregor*, Id. 565; *Gehrens* v. *Huhn M. Co.*, Id. 632.

the engineer in charge, from the surface of the rock to the bottom of the shaft, said shaft to be twenty feet by twenty-seven feet in size, and to drive the headings and tunnel from the shaft to the points where the headings might meet the headings driven from the other shafts, and to place all of the material taken out of the shaft into cars at the mouth, and to sink the shaft to a depth of twenty feet; and that the defendant agreed, etc., to furnish as many cars as he could conveniently supply, and the track for the same, for removing material from the mouth of shafts, and to pay for the sinking of the shaft $4 per cubic yard, and for the headings and tunnel $6 per cubic yard; and that it was further agreed that if the plaintiff did not drive the work to the satisfaction of the chief engineer of the railroad company, the defendant should have the right to enter upon and take possession of the work, and put in as many men as would insure its completion, etc.

It is then averred that the plaintiff entered upon and was proceeding with the work under the said contract, and was making large gains and profits thereby, when the defendant, before the completion thereof and during the temporary absence of the plaintiff without any justifiable or lawful cause or excuse, entered into said shaft and tunnel and took and kept possession of the same, thereby depriving the plaintiff of the right and privilege of fulfilling said contract and of making all the gains and profits which he had a right to make, and would have made in the execution of said work and completing said contract.

The defendant below pleaded the general issue, giving notice therewith, that on the trial of the cause he would offer in evidence a contract or agreement, under seal, between the plaintiff and defendant, and would prove that the plaintiff did not perform his work according to the requirements of that contract.

This contract thus referred to in the defendant's notice, bearing date September 10, 1874, and sealed by the plaintiff and defendant respectively, was offered in evidence by the plaintiff as the agreement recited in his declaration.

Mr. Justice Knapp in his charge to the jury refers to the fact that the plaintiff had grounded his action, not directly

upon the contract, but upon a duty collateral to the contract, the contract being regarded merely as inducement, and remarks that the pleadings in the case suggest the question whether the plaintiff was seeking redress through the proper form of action. The doubt implied in this remark was well founded.

The common law doctrine on this point, as stated by Mr. Chitty, is, that if the contract is laid as inducement only, case, for an act in its nature a tort or injury, afterward committed in breach of the contract, may often be adopted. But he says further, that if there is a covenant or contract under seal between the same parties, and directly relating to the matter in dispute, the action must, in general, be in covenant and founded thereon. The only exception referred to is in the case of a tenant committing waste, and who had expressly covenanted against it, the ground of the exception being, that the landlord, having by special covenant acquired a new remedy, did not thereby lose his old remedy by action of waste, or on the case in the nature of waste. 1 Chitty's Pl., 154, 155, 160, 161; *Kinlyside* v. *Thornton*, 2 W. Black. 1111.

At common law, therefore, and under the law of this State as it stood before the act of March 17, 1855, an objection to the form of action adopted in this case might have been urged with fatal effect.

It was rightly held, however, by the court below, that the case having been tried on its merits, an amendment might be made, if necessary, to frame the action and pleadings to the case made by the proofs. The same doctrine will be applied by this court.

The greater part of the exceptions taken at the trial relate to the construction of the contract of September 10, 1874, and to the question as to the damages which the plaintiff might recover for its violation.

1. As to the true meaning and legal effect of the contract.

The clause which provides that "in case the said second party does not drive the work to the satisfaction of the chief engineer of the railroad company, then the said first party shall have the right to enter upon and take possession of the works, and put on as many men as will insure the completion of said work," was the subject of much discussion in this court and in the court below.

The case shows that the chief engineer had served on McAndrews this notice: "Shaft No. 4 must be put in a shape that will enable it to be driven with increased results. Its past working has been entirely too unsatisfactory, and I direct you to make such changes as will insure its completion by March 1, 1876." It appears also that McAndrews forthwith informed Tippett, the plaintiff below, of the receipt of that notice, adding these words: "You are therefore hereby notified that I shall, under our contract, enter upon and take possession of work on said shaft on the 1st day of May, 1875, at which time you will vacate the premises."

It was insisted in the court below, on the part of the defendant, that by the plaintiff's failure to drive the work to the satisfaction of the engineer, he had, *ipso facto*, absolutely forfeited his right to complete the contract, and that the right had thereupon resulted to the defendant to enter upon and take possession of the work, as he had done, and to complete it independently of the plaintiff.

The answer to this on the part of the plaintiff was, in the language of the court below, "that the delay of which the engineer complained was brought about by the defendant's own default in previously interfering with, hindering or withholding from the plaintiff the requisite amount of cars to do this work, and, therefore, was not in good faith; that he was doing that with a view of so delaying the plaintiff that the engineer should become dissatisfied, and then authorize the defendant, under the terms of that contract, to take such steps as would get back the possession of the work and give the defendant the profits which the plaintiff would have been entitled to."

There being evidence tending to prove each of the particulars embraced in the foregoing instrument of the plaintiff, the court submitted to the jury these questions: 1, was there unreasonable delay? 2, did the defendant cause this delay?

And the jury were thereupon charged that if there was unreasonable delay in the work by the plaintiff, which called for the intervention of the engineer, and such intervention was made in good faith, and McAndrews acted on it in good faith and took possession of the work and finished it, the plaintiff can not recover. If there was no delay, or if the defendant, by unreasonably withholding cars from the plaintiff, caused the

delay, or, acting from indirect motives, the defendant designedly embarrassed the plaintiff in this work, and procured the notice to be given merely to get possession of the work and deprive the plaintiff of it, and did so get possession, and did get the plaintiff out of his employment, then the plaintiff should recover.

With respect to that clause of the contract which required McAndrews to furnish as many cars as he could conveniently supply, and the track for the same for removing materials from the mouth of shafts, the court charged as follows: "The defendant by the contract is to furnish as many cars as he can conveniently supply and the track for the same, for the removing the material from the mouth of the shaft. This does not mean that the defendant shall furnish only such cars as may suit his whim and pleasure, but it means that he will furnish all the cars that the exigencies of the situation will permit, without inconvenience to him in meeting the reasonable demands of the work as a whole."

The court below adopted, as it seems to me, the only rational interpretation of the contract in question.

To have held according to the insistment of the defendant, that any delay occasioned by his own acts or omissions could be made the ground for avoiding the contract against the will of the plaintiff, would have been to permit the defendant to take advantage of his own wrong.

2. It is insisted in the next place, that the court below erred in ruling that the plaintiff was entitled to recover, by way of damages, any profit which he might have derived from the contract if he had completed it.

This position is not tenable. The cases cited in support of it—*Freeman* v. *Clute*, 3 Barb. 424, and *Coweta Falls Man. Co.* v. *Rogers*, 19 Ga. 416—do not sustain it. The profits claimed in this case, instead of being the merely speculative, conjectural and remote profits excluded by the cases referred to, are such as would naturally and probably have accrued to the plaintiff if he had been allowed to perform the contract, and might be ascertained with reasonable certainty from the contract price, the cost per cubic yard, the rate at which the excavation had proceeded when not hindered by the defendant, and other facts disclosed by the testimony. They are

within the rule adopted by the Supreme Court, and sanctioned by this court in the case of *Wolcott* v. *Mount*, 7 Vroom, 262. The principles governing the allowance of profits by way of damages, were fully discussed in that case.

Mr. Justice Depue, in delivering the judgment of the Supreme Court, after referring to the restrictive rule which prevailed in the earlier English and American cases, both in actions of tort, and on contracts, says:

"This abridgment of the power of courts to award compensation adequate to the injury suffered, has been removed in actions of tort. * * * A similar relaxation of this restrictive rule has been made, at least to a qualified extent, in actions on contracts; and loss of profits resulting naturally from the breach of the contract, has been allowed to enter into the damages, recoverable when the profits that might have been realized from the performance of the contract are capable of being estimated with a reasonable degree of certainty." He says further, citing *Fox* v. *Harding*, 7 Cush. 516, and *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61: "On an executory contract, put an end to by the refusal of the one party to complete it, for such breach the other party may recover such profits as would have accrued to him as the direct and immediate result of the performance of the contract."

No distinction in principle is perceived between the cases cited approvingly by the Supreme Court, and the one now before us. From the result reached by the jury, under the instructions given them, it must be presumed that the contract in this case was, in legal effect, broken by the defendant, and the plaintiff must be entitled, under the rule stated, to recover as damages, such profits as would have resulted directly and immediately from the performance of the contract.

This was in substance the rule adopted by the court below.

The exceptions relating to the interpretation of the contract in question, and to the rule as to damages recoverable for its violation, are not sustained.

It was further insisted on the part of the defendant below, that no damages arising after suit brought, could be allowed by the jury.

In *Birchard* v. *Booth*, 4 Wis. 67, it was held that, in an action for assault and battery, the plaintiff may recover for damages

arising after the commencement of the suit, provided they are the direct and natural consequences of the battery.

And in *Hopkins* v. *Atlantic and St. L. R. R.*, 36 N. H. 9, in an action by a husband against a railway company for an injury to his wife, his expenses for her cure, incurred after the bringing of the suit, were allowed.

Mr. Sedgwick, citing these cases, says: "As a general proposition, it may be said that the plaintiff is at liberty to prove, and the jury are bound to take into consideration, those direct and immediate consequences of the act complained of which are so closely connected with it that they would not, of themselves, furnish a distinct cause of action." Sedg. on Dam. 115. (4th Ed.)

The instructions to the jury upon the point in question were in accordance with the doctrine just stated, and were correct.

Finding no error in the record sent up in this case, my conclusion is that the judgment of the Supreme Court should be affirmed, with costs.

For affirmance, all the judges.

1. Contract to drive tunnel for an interest: *Barber* v. *Cazalis*, 2 M. R. 684.

2. Construction and enforcement of complicated contract on railroad tunnel: *Long Dock Co.* v. *Mallery*, 12 N. J. Eq. 95, 431.

3. Accounting between contractors, on tunnel: *McAndrew* v. *Walsh*, 31 N. J. Eq. 331.

4. One tunnel enjoined from taking water from another tunnel: *Cole Co.* v. *Virginia Co.*, 7 M. R. 503.

5. Conclusiveness of engineers' measurements: *Hinkle* v. *San Francisco Co.*, 55 Cal. 627.

6. Lot owner may not tunnel under street after minerals: *Matthiessen Zinc Co.* v. *LaSalle*, 117 Ill. 411.

7. It is within the implied powers of a mining corporation to construct a tunnel: *Sutro Tunnel Co.* v. *Segregated Belcher Co.*, 19 Nev. 121.

8. It is no defense to tunnel contract that it might have been constructed at a less sum per foot: *Id.*

9. Ledge owner may not tunnel under town lot held in fee: *Dower* v. *Richards*, 73 Cal. 477.

10. And a license to run such tunnel given without consideration is revocable: *Id.* And the running of such tunnel amounts to irreparable injury: *Richards* v. *Dower*, 64 Cal. 62. (The broad rule so stated in this case will not be received without serious dissent.—R. S. M.)

BUCK v. LODGE.

(18 Vesey, Jr., 450. High Court of Chancery, 1812.)

Purchaser in possession, taking profits. Order on purchaser, before conveyance, pending bill for specific performance, to pay into court installments due on account of the subject of contract, being a coal mine, and the purchaser in possession and working it.

By an agreement in writing, dated 2d of January, 1810, the defendant contracted to purchase all the coal under the plaintiff's estate in Denholme, with liberty to use the water and get stones for what pits and erections might be necessary for working the colliery, at the price of £5,000, to be paid, with interest, in the following manner: the first installment, £1,000, at the end of two years from the date, with interest upon that sum and the remainder of the purchase money; the second, the like sum of £1,000, with interest in like manner, at the end of three years; and similar payments at the end of four, five and six years; Lodge to pay all damages to the tenants; a conveyance to be made, with all proper and usual covenants, stipulations and agreements, on behalf of both parties; the interest upon the above sums to be paid half-yearly, and to commence this day; and the payment of the purchase money and interest to be secured upon the coals and by bond; and sufficient pillars to be left, according to the custom of the country.

The bill prayed a specific performance. The answer admitted that, immediately after the agreement, the defendant entered, erected the necessary works, and has continued to work the colliery; that he has paid to the plaintiff one half-year's interest due on the 2d of July, and is ready and willing to pay the second half-year, and would have paid it if no objection had been made by the plaintiff to performing the agreement; but the plaintiff has objected to perform his part according to the true intention; denying that the plaintiff has offered to

[1] Purchaser may entail awkward consequences upon himself by taking possession of an estate he has contracted for before the title is cleared: *Calcraft* v. *Roebuck*, 1 Ves. Jr. 221. The rules applicable to ordinary purchase of real estate may require modification in many respects when the subject of contract is a colliery: *Wren* v. *Kirton*, 2 M. R. 408. As to what is required of vendee in possession, see *Clarke* v. *Wilson*, 15 Ves. Jr. 317, and note.

perform and made applications to the defendant, and that he has refused to pay the further interest, or execute the security, etc.; and insisting that he was always ready to perform.

A motion was made by the plaintiff for an order upon the defendant to pay into court the sum of £1,000, being the first installment, due on the 2d of January, 1812, and to pay to the plaintiff £375, being the interest upon the purchase money due on the 2d of January and the 2d of July, 1811, and the 2d of January, 1812, respectively.

Sir SAMUEL ROMILLY and Mr. THOMPSON, for the plaintiff, in support of the motion, relied upon the nature of the subject and the admissions that the defendant has been in possession and was working the colliery, and had paid one half-year's interest; by his answer making no objection to the title; and submitting to perform the contract.

Mr. HEALD, for the defendant, said there was no precedent for this application; and the plaintiff might protract the suit, and thus obtain the payment of all the installments before he executes the conveyance; which is inconsistent with the clear effect of the contract.

The Master of the Rolls (Sir WILLIAM GRANT) said he thought the application reasonable, as the defendant was in possession and making a benefit by working the mines.

The order was made for payment of the money in a month.

FISHER v. WORRALL.

(5 Watts & Sergeant, 478. Supreme Court of Pennsylvania, 1843.)

Equitable defense to purchase money. Defense upon equitable grounds may be taken to an action for purchase money, even at common law.

[1] **Misrepresentation defeats specific performance.** A misrepresentation of an occult quality in land (as to the existence of iron ore), although it be made in ignorance of the truth and although the vendee agrees to run the risk of this, in an action to procure specific performance of the contract of sale, is a decisive objection to plaintiff's recovery.

Time as affecting the question of tender, considered.

Bowman v. *Irons*, 13 M. R. 312.

Error to the Common Pleas of Perry County.

This was an action of covenant in which the plaintiff, the vendor, sought to recover a judgment in execution, specifically, of an agreement for the sale of a tract of land, which is thus set forth in his declaration:

William Logan Fisher was summoned to answer Charles Worrall of a plea that he hold to him the covenants between them made, according to the force, form and effect of certain articles of agreement between them made, etc., and whereupon the said Charles Worrall, by his attorney, saith: That whereas, by certain articles of agreement made at Mifflin county, the 6th day of July, 1840, between the said Charles Worrall, of the one part, and William Logan Fisher, by the name of William Logan Fisher and Charles W. Morgan, of the other part (which said other part, with the seal of the said William Logan Fisher sealed, the said Charles Worrall here into court brings, whose date is the day and year aforesaid), it was concluded and agreed by and between the said parties, and the said Charles Worrall did covenant by the said articles, that he, the said Charles Worrall, for and in consideration of the sum of $9,000, to him agreed to be paid by the said William Logan Fisher, by the name of Fisher and Morgan, would, on or before the 1st April then next (1841), by good and lawful deed, well and sufficiently grant, convey and assure in fee simple, clear of all incumbrances, unto the said Fisher and Morgan, their heirs and assigns, all that certain messuage, tenement and tract of land in Oliver township, Mifflin county, bounded on the north by the Hon. John Oliver's residence, on the west by lands of John Robinson, on the south by lands of John Masden, and on the east by lands of Robert Hope and others, containing about 170 acres, be the same more or less; and the aforesaid William Logan Fisher, for himself, his heirs, executors and administrators, did covenant and agree to and with the said Charles Worrall, by the same agreement, that they, the said William Logan Fisher and Charles W. Morgan, their heirs, executors and administrators, or some of them, should and would on the execution and delivery of the said deed as aforesaid, well and truly pay or cause to be paid unto the said Charles Worrall, his executors, administrators and

assigns, the sum of $9,000, in manner following, to wit: $2,000, part thereof on the delivery of the deed for the premises, and the residue as follows: $3,000 on the 1st July next (1841), with interest from the 1st April next (1841), and the residue, being $4,000, in eight equal annual payments of $500 each, without interest, to wit: The first payment of $500 to be made on the 1st April, 1842, and the remaining payments to be made on the 1st of April of each year thereafter, until all be paid; and that the said Fisher and Morgan would give to the said Charles Worrall bonds and mortgages for the security of the payment of the same, and upon the executing and delivery of the said bonds and mortgages, the said Charles Worrall did agree to give the said Fisher and Morgan possession of the premises. And the said Charles Worrall did further agree to give them, the said Fisher and Morgan, the right of digging ore immediately after signing the said article, and also to transfer to the said Fisher and Morgan the lease of the said property between him, the said Worrall, and the tenant on the premises, as by the said articles of agreement more fully appears. And the said Charles Worrall in fact saith, that although he, the said Charles Worrall, from the time of making of the said articles of agreement hitherto, hath well and faithfully performed and kept all and singular the covenants and agreements in the said articles contained, which on his part were to be done and performed, yet he, the said William Logan Fisher and the said Charles W. Morgan, or either of them, did not pay unto the said Charles Worrall the said $2,000, or any part thereof, on the execution and delivery of the said deed as aforesaid. Nor did the said William Logan Fisher and the said Charles W. Morgan, or either of them, pay the said sum of $3,000 on the 1st July next (1841), with interest from the 1st April, 1841; nor did the said William Logan Fisher and the said Charles W. Morgan give their bonds and mortgage unto the said Charles Worrall for the payment of $500 on the days and times before mentioned, which unto him, the said William Logan Fisher, ought to have been given at or upon the execution and delivery of the deed as aforesaid, according to the form and effect of the said articles of agreement. And so the said Charles Worrall saith that the aforesaid William Logan Fisher (although often

required), his covenant aforesaid hath not kept, but broken, and hath hitherto refused, and still doth refuse, to keep the same, to the damage of the said Charles Worrall $20,000, and therefore he brings suit.

The plaintiff, after giving the agreement in evidence, proved that on the 7th April, 1841, he tendered to Wm. L. Fisher a deed in execution of the contract, and that he had quitted the possession of the land which he might take, but Fisher refused to accept it, or to have anything to do with the land. The plaintiff also proved that Fisher had said, some time before, that he would not accept the deed or take the land.

The defendant then proved that the defendant and Charles W. Morgan were ironmasters, and then engaged in carrying on that business in Perry county, and were very desirous to obtain iron ore; that they purchased this land with a view of securing the iron ore that was in the land, and they gave in evidence the following letter of George Worrall to Fisher, dated 7th May, 1840:

"I understand you were in our neighborhood hunting iron ore. I have a great quantity on my farm, such as the ironmasters of Perry county are getting here. Thomas & Co. have delivered some of the blooms made of the same ore down the country, and tell me they can make nails out of the blooms, the iron is so fine. I will dispose of my farm, containing 168 acres, on trade for a small farm in Cumberland, if you have such. My farm is near the Three Locks in Mifflin county. I wish you would come up and see, or send me word. Direct your letter to Shade Mills Post Office, Mifflin county."

The defendant then proved by a number of witnesses that he had made use of the necessary skill and industry to obtain ore on the land but it was not to be had; that this was before the first April, 1841, when the contract was to be executed, and that when he discovered that he was disappointed in his expectation of getting ore, he declared he would not take the land.

The plaintiff then proved by a witness who was present at the execution of the article of agreement, that when the parties spoke of the price of the land, Fisher said if he got ore, as he expected, it would be cheap enough, but that he had to take the risk of that.

The plaintiff then executed and filed the following stipulation: I, Charles Worrall, the plaintiff, do hereby stipulate and agree that upon the jury finding a verdict for me in this action, for the whole amount of my claim as stated in the first point to the court by my counsel, to wit, for the sum of $8,682.21, being the whole amount of the purchase money of the land mentioned in the agreement which is the foundation of the action, I will release and acquit the said William Logan Fisher of and from the sum of $3,280.56, part of the said verdict, being that part of the purchase money which fell due from and after the 1st of February, 1841, upon the said William Logan Fisher and Charles W. Morgan executing to me eight bonds for $500 each; the first payable on the 1st April, 1842, and one payable at each 1st April thereafter, until the whole be payable, and executing a mortgage of the tract of land sold by me to them to secure the payment of the said bonds; the same to be done within such reasonable time as the jury shall allow.

Witness my hand and seal the 3d August, 1842.

The plaintiff requested the court to charge the jury upon the following points:

1. If the jury believe that the plaintiff has truly performed all the covenants and agreements contained in the articles which he was bound to perform, and the defendant has entirely failed on his part, then the plaintiff is entitled to recover the purchase money of the land, as mentioned in the said articles of agreement, as the measure of damages upon the principles of a calculation reducing the payments to cash.

2. If the jury believe that William Logan Fisher gave notice to Charles Worrall before the 1st April, 1841, that he would not comply with his contract, there was no necessity for making any tender of the deed or title, and the proof of such tender, under such circumstances, is not essential to the plaintiff's right to recover.

3. If the jury believe that the parties to this suit executed and completed their contract and both understood it so, and William Logan Fisher, the defendant, insisted on the same being finally executed and placed upon record before he left town, and it was so done, the fact of Charles W. Morgan not signing it will not prevent the plaintiff from recovering in this suit.

REED and ALEXANDER, for plaintiff in error.

WATTS, for defendant in error.

The opinion of the court was delivered by GIBSON, C. J.

The verdict, in this instance, is avowedly for the price of the land; but there is a vice in it, as well as in the cause of action, which must eventually preclude a recovery. Defense upon equitable grounds may be taken to an action for purchase money even at common law, and with greater reason it may be taken to such an action where it is employed to perform the office of a bill for specific execution. The first inquiry then, is, what would a chancellor decree on all the circumstances of the case disclosed by the evidence?

The decisions on the subject of misrepresentation as an answer to a bill for specific performance, are not entirely consistent with each other. In *Willingham* v. *Joyce*, 3 Vez. 168, an agreement for a lease, which had been procured by representing the applicant to have long been the tenant of the person who recommended him, and punctual in the payment of his rent, was not deemed proper for specific performance, because it was thought the respondent would not have entered into the agreement had he known, what was true in fact, that the applicant had been the tenant of the person only a short time, and had been distrained for the rent and taxes. On the same principle was *Phillips* v. *Buckingham*, 1 Vern. 227, in which it appeared that the vendor had previously broken off a treaty with the same purchaser on a difference about the price, on which the latter procured Chancellor Nottingham's secretary to negotiate the purchase in the name of .the chancellor's son, to whom the vendor professed himself willing to part with the estate for less than he would take from another and desired the chancellor to name the terms, but the lord keeper refused to execute the contract. Lord Thurlow attempted to cast a shade on the authority of that case in *Irnham* v. *Child*, 1 Bro. C. C. 95, but it is sustained by Lord Bathurst's decision in *Eyre* v. *Popham*, in the appended note. The principle, however, seems to have been narrowed by the vice-chancellor in *Fellowes* v. *Gwydyr*, 1 Simons, 63,

who enforced the contract, though the purchaser had obtained peculiarly favorable terms by untruly representing himself to be the agent of a person whom the vendor was willing to oblige, because the purchaser did not *know* that he could not have obtained the same terms in his own name. I am unable to see the justice of that, or what the vendor had to do with the knowledge or motive of one who had decoyed him into a bargain he would not otherwise have made, by false pretenses. No untruth can be entirely blameless, and he who practices a gratuitous deceit must answer the consequences of it, independently of all consideration of his motive. And such is the principle of *Twining* v. *Morrice*, 2 Bro. C. C. 326, in which the master of the rolls refused to execute a purchase because the vendor's agent had bid for the purchaser and unintentionally cast a damp on the sale by creating a belief in the bystanders that he was bidding in the estate for the vendor. Yet there had been no design to represent anything; notwithstanding which, it was thought to be enough that the vendor had suffered by a misconception not of his own making. It is difficult to conceive how there could have been misrepresentation in *Fellowes* v. *Gwydyr*, without a sinister motive, and it was said by Lord Manners, in *O'Rourke* v. *Percival*, 2 Ball & Beatty, 62, to be an established principle of the court not to decree specifically where it does not appear that the party calling for the chancellor's aid has acted, not only fairly, but in a manner clear of all suspicion. The preceding cases go to misrepresentation as to the person of the purchaser, but they disclose a principle of general application, that where the assent of a party has been procured through misapprehension induced by the conduct of him who insists on the bargain, a chancellor will leave him to his remedy at law.

But misrepresentation of the thing sold is equally decisive. Thus in *Shirley* v. *Stratton*, 1 Bro. C. C. 440, where the vendor represented the estate as clearing £90, but suppressed the fact that a wall on it was to be repaired at an annual expense of half the sum, the court dismissed the bill. And in *Shovel* v. *Bogan*, 2 Eq. Ca. Abr. 688, a false representation of the quantity, the land being sold by the acre, was allowed to have the same effect. So in *Buaton* v. *Lister*, 3 Atk. 382, purchasers who had been induced to agree to an exorbitant

price for timber trees, by the false assurance of the seller that certain timber merchants had valued the lots at so much, were not held to specific execution. I have found no case of misrepresentation as to the quality of the soil, but *Scott* v. *Hanson*, 1 Simons, 13, and there the estate was represented to be uncommonly rich, watered meadow land, but it was in truth only imperfectly watered. The vice-chancellor agreeing with Sir William Scott in *Trower* v. *Newcome*, 3 Mer. 704, that an indefinite and vague representation was to be treated by the purchaser only as a ground of inquiry, was of opinion that the expression "uncommonly *rich*, watered meadow land" had regard, not to the watering, but to the soil, and considered the whole as á loose observation of the vendor or the auctioneer, on which the vendee ought not to have placed reliance. Undoubtedly a vendor may praise to the most extravagant extent, qualities which are susceptible of inspection, but a misrepresention of an occult quality, in regard to which the vendee is not supposed to buy on his own judgment, would be followed by very decisive consequences. Now what is the case at bar?

The overture came from the vendor. He wrote to the vendee, an ironmaster who had been hunting ore in the neighborhood, that he had a great deal of it on his land, of a fine quality, and such as the ironmasters in Perry county were getting; offered to sell him his farm, and invited him to view it. The vendee came, and was shown the tail of a vein at a place where there had been an opening, but it was partly filled up. He was assured that there was a very great quantity of it, and that the vein was a foot thick; relying upon which, and declaring that the ore, not the land, was his object, he struck the bargain. The mine was on lease to a man of the name of Conwall, who had desisted from working it, and who testified at the trial that the produce was not worth the expense, but this fact, so far as concerned the scarcity, was not communicated. Such is the case made out by the proofs on the part of the defendant.

The material circumstance added to it by the proofs on the part of the plaintiff is, that the defendant was persuaded to take the risk of the ore on himself, and to take the property subject to Conwall's lease. But what matters such a stipula-

tion, if the whole contract was procured by misrepresenting the fact which was the sole inducement to the purchase? The mine was found to be worthless. The thickness of the vein proved to be not only a vast deal less than a foot, but so inconsiderable as not to be worth the working of it; and the object of the purchase, induced as it was by the vendor's positive assertion of a fact which he at least did not know to be true, had utterly failed. Was not the bargain, then, procured by misrepresentation?

The circumstances of the case resemble those of *Young* v. *Clerk* (Prec. in Ch. 538), which was a bill to have specific performance of articles for a lease. The defendant, who had not seen the land or known anything of its value, viewed it in company with the plaintiff, who had been tenant to the preceding owner, then recently dead, and who gave the defendant the only information he received from any one. Having no judgment of his own as to the annual value, he asked to see the counterparts of the leases to the under-tenants, but was shuffled off, and prevailed on to execute the articles, shortly after which he discovered that he had been greatly imposed on. Lord Macclesfield was clearly of opinion that he was not bound to enforce articles when unreasonable, or founded in fraud, and when it would be obviously unconscionable to assist the party; and that as the articles before him were of that sort, though no direct fraud was proved, it was proper to leave the parties to their remedies at law. The case before us, however, is much stronger, in respect that the vendee was compelled to rely on the representation of the vendor, while the defendant in *Young* v. *Clerk* might, by insisting on the production of the leases, or by consulting men of judgment, have ascertained the annual value elsewhere. *Brereton* v. *Cowper*, 1 Bro. P. C. 211, is another case of this stamp. These show that to assert for a truth what the party does not know to be so, is equivalent to the assertion of a known falsehood; and that a chancellor will not execute a purchase where the vendee has relied on the vendor's unfounded assertion.

Principles of equity are more delicate and subtle in their texture than rules of law; and where the application of them to the facts and circumstances of a cause is left to the unpracticed

hand of a jury, such a verdict as the present may well be expected. The proper direction would have been, that, taking the evidence on both sides to be true, the plaintiff could not recover.

The omission to tender the conveyance at the day would be unimportant, though the old doctrine that time can not be of the essence of the contract, has given place to a more reasonable one. Perhaps the proper rule has been laid down by Chancellor Kent, in *Benedict* v. *Lynch*, 1 Johns. Ch. 374, that where the applicant for specific performance has omitted to perform his own part, without being able to assign a justification or excuse for it, and where there is nothing in the acts or conduct of the other party which amounts to an acquiescence in the delay, the court will not interfere. But was there not a justification of the plaintiff's omission in the defendant's notice, through his agent, that he would not abide by the bargain? Instead of a monition that punctual performance was expected, it is a disavowal of the contract and a waiver of all performance whatever. It was said by Mr. Justice Washington, in *Blight* v. *Ashley*, Peters' C. C. 24, that a man bound to do a thing must do it, or offer to do it, unless the other has dispensed with it beforehand. The principle that a man is not bound to go through the form of a tender which he has been told would be rejected is a common one, and exemplified in Buller's Nisi Prius, 96, by the case of a tenant who has waived a tender of notice to quit by disclaiming the tenancy and attorning to a stranger. Had not the conveyance been faulty in misdescribing one of the grantees, it might ha e been tendered at any time before suit brought, or, perhaps, at the trial.

But the decisive defect is in the verdict, not because it is for installments not demandable at the suing out of the writ, for the action was brought to enforce, not only payment of the installments due, but the giving of security for those to come; and this could be done only by a conditional verdict for the whole. But the condition imposed by the jury is one which a chancellor would not have imposed. The verdict is for the gross amount, time being given to deliver bonds and a mortgage for the immature installments, to be executed by Mr. Morgan and the defendant himself, in order to meet the stipulation filed in the cause by the plaintiff. But Mr. Morgan is a stranger to the cause and the contract; and I take it, a party

is not compellable by attachment or a penalty to procure the joinder of another whose actions he can not control. The old doctrine on the subject has given place to a more rational one. That a vendor shall not be forced to procure the joinder of his wife, was determined by this court in *Clark* v. *Seirer*, 7 Watts, 107; and there is no room for a difference, in this respect, between a wife and a stranger. A party who covenants to procure such a joinder, is doubtless liable for a failure in damages proportionate to the loss; but not stipulated damages in the shape of the whole purchase money, which may be exorbitant. Had the plaintiff entitled himself to specific performance of the other parts of the contract, and been content to take such bonds and such a mortgage as the defendant could give him, a verdict to that effect would have been well, but he was not entitled to anything further.

Judgment reversed.

HARRIS v. TYSON.

(24 Pennsylvania State, 347; 64 Am. Dec. 661; B. & W. L. C. 351. Supreme Court, 1855.)

[1] **Undisclosed knowledge by purchaser of mineral value, no fraud.** A person who knows that there is a mine on the land of another, of which the latter is ignorant, may nevertheless buy it. The ignorance of the vendor does not of itself render the transaction fraudulent on the part of the purchaser.

Idem. The mere fact, therefore, that the vendee of a right to dig up all minerals and mineral substances of value, and remove the same from the land of the vendor, was aware, at time of the purchase, of the existence of a valuable deposit of sand chrome on the land, of the value of which the vendor was ignorant, though he knew of the deposit, is no ground for impugning the validity of the conveyance.

Contra, if he make false statements. If the vendee, during the negotiation for the purchase, had wilfully made any misstatement of a material fact, and thus misled the vendor and induced him to sell at a lower price than he otherwise would, the contract would have been a cheat, and the conveyance void.

Mere inadequacy of price is not sufficient to set aside a deed. It is sometimes regarded as a suspicious circumstance when coupled with other strong evidence of fraud.

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[1] *Williams* v. *Spurr*, 7 M. R. 17; unless they stand in a fiduciary relation: *Bell* v. *Bell*, 3 W. Va. 183.

Duress, to invalidate a deed, must be of the person. A threat to sue the grantor for a good cause of action will not invalidate it.

[1] **Public declarations before purchase, as evidence of fraud.** An offer on the part of the plaintiff, in an action for the rescission of a conveyance, to prove that the defendant, having knowledge of the nature and value of sand chrome, of which a large body existed on the plaintiff's land, concealed that knowledge, and actively put in circulation a report that *sand chrome* was of no value, and thus impressed the public mind with that idea, for the purpose of enabling him to make extensive purchases of lands containing sand chrome, and that in consequence of an erroneous impression thus created, the defendant was enabled to buy most of the chrome lands in the neighborhood, including the plaintiff's tract, was properly rejected, no offer being made to show that the declarations of the defendant proposed to be proved were made to the plaintiff, or in his presence, or were communicated to him.

Evidence that the plaintiff was a poor man, was properly rejected.

Disclaimer. The defendants had a right to file of record, during the trial, a disclaimer of all right to the land described in the writ, except as to the privilege of taking out chrome.

An offer to prove "conversations," without showing, with the offer, their relevancy, may be refused, without error.

General statement no proof of specific fraud. A declaration by defendant that it was his intention "to monopolize the chrome business," is not evidence in an action brought to set aside a conveyance of a chrome right in the land of the plaintiff.

Letter, as evidence. A witness having testified that he had received a letter from defendant, the contents of which he communicated verbally to the plaintiff, it was not error to permit the letter to be read to the jury—it being evidence of the defendant's fair dealing in relation to the contract sought to be set aside, and relevant to the point in controversy.

Error to the Common Pleas of Chester County.

This was an action of ejectment brought by Jesse Harris against Isaac Tyson, Jr., and others, in which the plaintiff claimed to recover the exclusive possession of a tract, containing about 80 acres of land in East Nottingham township, Chester county. Isaac Tyson, Jr., was not summoned; the persons summoned were his agents, or workmen, and claimed the right to enter upon the land in question under him. The defendants were considered on the trial as nominal parties merely, Tyson being the real defendant.

It was not denied that Harris, the plaintiff, was the owner of the fee; but it was contended that the defendants were entitled to a limited possession under said Tyson, for the pur-

[1] *Bedford* v. *Bagshaw*, 6 M. R. 514; *Kimmins* v. *Wilson*, 2 M. R. 159; see *Perkins* v. *Prout*, Id. 139.

pose of digging and removing chrome, under a deed by Harris to Tyson, dated 14th April, 1837. By the deed, Harris, for the consideration of fifty dollars, conveyed the land to Tyson, "said conveyance being only for the purpose of digging or removing all minerals or mineral substances of value"—the latter to have free liberty to dig, and privilege of ingress and regress—"with the right to erect such buildings as are necessary for the mining operations."

The defendants then rested; and the plaintiff, alleging that the deed was procured by frand and misrepresentation, attempted to sustain the allegation by the testimony of witnesses.

It was shown that Tyson, who resided in Baltimore, prior to the year 1832, was extensively engaged in preparing chromate of iron (usually called chrome) for market. This mineral was found to exist in its native state in several conditions: *rock chrome*, which was found in subterranean veins; *surface chrome*, which existed in lumps or masses above ground, and *sand chrome*, which lay in the beds or on the margins of small streams of water as they now run, or as they ran formerly, in the shape of coarse, heavy sand. The defendant's principal operations, prior to 1832, were at Soldiers' Delight, in Baltimore county, Maryland. Having exhausted the supply of rock chrome at that place, he began, about that time, to take out sand chrome from the beds and margins of the watercourses. In 1834 he began to obtain chrome from Chester county, Pennsylvania.

In the southwestern sections of Chester county are two districts of country called respectively "White Barrens" and "Pine Barrens," not far distant from each other. These districts present everywhere a very poor, barren soil, almost unfit for agricultural purposes, and of little value, except for the chrome they contain. The tract of land belonging to Harris, the plaintiff, is situate within the "White Barrens," having upon it a log building in which Harris and his family resided. At the date of the conveyance to Tyson, the building was in a dilapidated condition, and scarcely habitable. The plaintiff was poor.

The plaintiff having given evidence tending to prove that Tyson was aware of the existence of sand chrome in the White Barrens, proposed to ask a witness if the chrome found everywhere in the White Barrens is the same mineral and of

the same kind as that found on the land of the plaintiff. This was objected to, and the offer rejected. The plaintiff excepted.

The second bill of exceptions was of the same import.

The third bill of exceptions related to the condition of the plaintiff's family, which was alleged to be sickly, infirm, and dependent; this the plaintiff proposed to show. The defendants objected. The proposition was overruled, and the plaintiff excepted.

The circumstances attending the execution of the deed were shown by two witnesses. One of them, Nevill, testified that in 1837 Tyson and Harris had a conversation about the sale of the land of Harris, for which Tyson offered from $300 to $400, and that they could not agree about the price, but in a week or two afterward Tyson returned, and offered the price asked, and being refused, Tyson asked for a lease of the chrome right. The witness further stated that Tyson said that he did not know that it would benefit him a great deal, because there was so much barren rock among it. Tyson requested Harris to go to Squire Bye's, and they went away together.

Amos Bye testified that they came to his house, and Tyson said he had offered Harris $350 for his place, and inquired if he did not consider it a fair offer. He said he did not. Tyson said it made no difference—he must have the mineral right—that he was willing to give him $50 for the mineral right, and if he would not take that he would be under the necessity of bringing an action against him for damages. Tyson wrote a deed, and it was executed by Harris alone, with his mark.

The plaintiff's counsel then proposed to show by the same witness that in 1836 Isaac Tyson called on the witness, and asked him to prepare a draft of the different streams that made up through the "Barrens," and place the names of the people that inhabited the houses, as he often passed through the Barrens, and if he got lost, he could tell from the houses where he was; that witness made such a draft, and gave it to Tyson.

The proposed evidence was objected to and rejected, and plaintiff excepted.

The same witness testified that, in his judgment, the land of Harris, in 1837, was worth $5,000; and that Harris could read, though he did not know that he could write.

Another witness testified that the land of Harris was worth, in 1837, $10,000. That without the chrome its value was not beyond $300 or $400.

The defendants proposed to file a paper disclaiming all right, title to, and interest in the premises described in the writ, except so far as concerned the mineral chrome. The plaintiff objected to the filing of such a paper; the objection was overruled, and plaintiff excepted.

The plaintiff then offered to prove that the defendant, concealing his knowledge of the nature and value of what is called sand chrome, purchased between the years 1836 and 1839 nearly all the tracts of land in the neighborhood of the plaintiff's farm, upon which was to be found sand chrome of the same character and quality as that found on the land of the plaintiff; that before the said purchases he took measures to conceal the value of the said sand chrome, and put in circulation a report that sand chrome was of no value, and thus impressed the public mind in the neighborhood with that idea, for the purpose of enabling him to purchase either the land or the ore lease at very small sums—much less than its real value; that with a view of producing this impression he publicly declared that the sand chrome found upon the Sherry property, adjoining the land of the plaintiff, was worthless, and that such was the fact also in reference to the sand chrome found on the land of the plaintiff; that declarations, coming from one supposed to be well acquainted with the subject, created a general opinion that sand chrome was worth nothing, and that, in consequence of this erroneous impression, he was enabled to buy most of the tracts in the neighborhood, and to procure the agreement with the plaintiff at a sacrifice.

The defendants objected; the offer was overruled, and plaintiff excepted.

The next four exceptions to the ruling of the court, rejecting evidence offered by plaintiff, depended on the same principle as the last.

To show knowledge on the part of Tyson, the plaintiff's counsel offered to prove "that in the year 1838 the defendant sent an agent to the neighborhood of the land in suit, that he examined the plaintiff's land with other land, and that the defendant himself came there and was told by the agent that

he could not take out all the sand chrome found in the neighborhood with a hundred hands in ten years."

The evidence was rejected and plaintiff excepted.

The court also rejected an offer by plaintiff to inquire whether the chrome appeared to be more abundant on the tract of the plaintiff than on the other tracts in the neighborhood; and to prove that prior to 1837 Tyson was seen on or near Harris' land, coming from the stream on Harris' land, and had conversation with the witness about the sand chrome there, or in the vicinity, and also to prove what that conversation was.

The plaintiff also offered to prove other conversations of Tyson about sand chrome in 1838, without stating what the conversation was. The offer was rejected, and the plaintiff again excepted.

The plaintiff proposed to ask a witness what he paid Sidwell for ore (chrome) leave in 1842 and 1846, and excepted to the opinion of the court overruling the proposition.

The plaintiff then proposed to prove Tyson's declared intention to monopolize the chrome business, and excepted to the opinion of the court overruling the evidence.

The plaintiff proved that after the purchase by Tyson no chrome of any value was extracted from the Harris tract till 1851, and gave evidence tending to show that Harris' business transactions had been extremely limited; that he had but little acquaintance with business, was ignorant, and that between 1837 and 1851, his house had been improved and repaired at Tyson's expense, so as to make it habitable.

On part of the defendant was given evidence to show that late in 1836, or in the beginning of 1837, Tyson opened a negotiation with Harris for the purchase of his land, for which he asked from $300 to $400. It appeared that, the parties not being able to agree upon a price, Tyson offered to the plaintiff $20 cash for the right to search his land one year for chrome, all loose ore to be his for expense of search, and $3 a ton besides for what he should take out, or to pay him $300 for the land. This evidence came from R. Sidwell, who had received a letter from Tyson making the offer, which he communicated from Tyson to Harris. In order to show what the offer was, Sidwell produced the letter, and it was

proposed to read it to the jury. Objection was made and overruled, and plaintiff excepted.

In 1850, Harris agreed to sell the land in fee to Tyson, for $600. The money was tendered, and deed written, but not executed.

The defendant further proved that in the year 1851, Harris, by an instrument in writing, which was produced, sold to J. P. Grier all his right and interest in the chrome found in the tract for $3 a ton, for every ton of clean ore he should get out of it; also that Grier had given Harris a bond of indemnity against any claim of Tyson, and covenanting to conduct and defend all suits relating to the chrome, at his own expense. The bond was read in evidence, and a general power of attorney also from Harris to Grier.

Evidence was given by defendant that Tyson took out a few tubfuls of sand chrome in 1840; that subsequently when persons mining on an adjacent tract trespassed upon the plaintiff's lands, and took out a quantity of chrome therefrom, Harris gave notice to Tyson's agent of the trespass, speaking of the mineral as the property of Tyson; and that Harris was always friendly with Tyson, and accustomed to speak of him gratefully for benefits conferred, till after his arrangement with Grier in 1851.

In order to show that Tyson possessed no knowledge of the extent of the sand chrome in any locality prior to 1839, evidence was given that the discovery was first made in that year that sand chrome was to be found beyond the channels and margins of the rivulets in which it had previously been known to exist, and sometimes extended to considerable distances into the fast land. This discovery was made by Tyson's workmen, in Chester county, and it led to their working again the ground at Soldiers' Delight, where the sand chrome was supposed to have been exhausted. The second working at that place produced more largely than the prior operations.

Proof was also given that magnetic sand was deemed worthless prior to 1839, and was still used in small quantities only in combination with a better quality of mineral, making, by the compound, a medium article for trade.

A number of points were submitted on part of plaintiff.

HAINES, President Judge, in his charge, observed that, as

from the pleadings it would appear as if the title to the land was in question, therefore a disclaimer of the title had been filed, and that it was proper. He charged that the right to erect buildings for mining operations, authorized the erection of temporary buildings for boarding and lodging of the hands.

He charged that actual fraud vitiates a purchase. But that when the deed in this case was procured, and till the year 1839, the existence of sand chrome in places outside the beds and banks of streams was unknown, and it was not until that year supposed that any considerable quantities of sand chrome existed in the fast land—that the poverty of the plaintiff had nothing to do with the case.

He further observed that Tyson, having exhausted the sand chrome in the bed of the stream at Soldiers' Delight, in 1837 directed his attention to Lancaster county. Being desirous of obtaining chrome, and Harris' land having been mined to a small extent on a lease to William Harris, he called on the plaintiff and made the proposition, "to give him $20 in hand for the exclusive right to search his land for *one year*, and give him $3 per ton for all he could get, or buy his land for $300—of which the $20 would then be in part pay, and if he did not buy, the $20 would be his. All loose ore to be his, for the expense of search."

This was about the middle of January, 1837, and is strong evidence of the ignorance of defendant as to the existence of chrome on the land of the plaintiff, immediately before the execution of the deed. What the answer to this proposition was we do not know, the letter from Sidwell to Tyson being lost; but either then, or at a subsequent period, *the contract for the sale of the whole property seems to have been concluded* by Harris agreeing to accept the offer of the $300. When, however, the deed was prepared for execution, and the money in the hands of the agent of Tyson to be paid over, Harris objected to signing the instrument, inasmuch as his wife was unwilling to leave the property. In this state of affairs Tyson executed an instrument of writing, which was subsequently handed over to Harris, whereby he agreed to permit the wife to remain on the property during her life.

This instrument is still in the hands of the plaintiff. Harris continuing to refuse to execute the deed for the conveyance

of the whole tract, the parties went together to Amos Bye's, as a friend, that they might be put right, and there, in the presence of that witness, they executed the deed upon which the defendant claims the right to possess a part of the land of the plaintiff for mining purposes.

He further observed: "But the plaintiff alleges that the defendant committed a fraud, by the intentional concealment or suppression of material facts, and by misrepresentation. To this I answer, 1. There is no evidence in the cause which shows that Isaac Tyson had a knowledge, at the execution of the deed, that there was sand chrome on the fast land of Harris; while there is testimony that he was ignorant of the fact until 1839. Where there was no knowledge, there could be no concealment.

"2. A purchaser of real estate is not bound, in law or equity, to disclose to the seller his knowledge of the existence on his land of a mine, of which the seller is ignorant; and this is emphatically true, where the opportunities of information are equally open to the inquiries of both of the contracting parties.

"3. There is not, in the recollection of the court, a tittle of evidence of misrepresentation by the defendant to the plaintiff.

"4. In order to render a contract void upon the ground of fraudulent misrepresentation, it must be of some material fact relating to the thing contracted for, and must relate to something in regard to which the vendor acts upon the misrepresentation of the vendee.

"As to the points submitted *on part of plaintiff:* The first related to misrepresentation by defendant, as to which the court said they saw no evidence. 2. Concealment implies knowledge, but there was no evidence that the plaintiff had superior knowledge as to the existence of chrome at the making of the contract. 3. and 4. That there was no evidence that the defendant produced a false impression on the mind of the plaintiff as to the existence of chrome on his land, or as to the value of it, and that he had no recollection of expressions or acts of Tyson tending to mislead the plaintiff. 6. That duress to avoid a contract must be of the *person.* 7. That actual fraud would avoid the deed. 8. That houses for boarding and lodging hands might be erected upon the land, without forfeiting the land so occupied. The 9th related to the disclaimer which was before answered in the charge."

February 11, 1853, verdict for defendants.

There were thirty-nine assignments of error, twenty-two of which were to the rejection and admission of evidence. and seventeen to the charge of the court, including the answers to the several points submitted on part of plaintiff. The several specifications were, however, classed in the argument, and considered under the appropriate heads. Also see the opinion of BLACK, J.

BELL, for plaintiff in error.

HICKMAN and LEWIS, for defendants in error.

The opinion of the court was delivered by BLACK, J.

This action depends on the defendant's right to dig and take away chrome from the land of the plaintiff. The defendant claims that right under the plaintiff's deed, giving and granting it in due form. But the plaintiff asserts that the deed is fraudulent and void because, 1. The defendant suppressed the truth; 2. He suggested a falsehood; 3. He paid a totally inadequate consideration; and 4. He got the deed by means of threats which amounted to duress.

1. A person who knows that there is a mine on the land of another may nevertheless buy it. The ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself. The mere fact, therefore, that Tyson knew there was sand chrome on Harris' land, and that Harris himself was ignorant of it, even if that were exclusively established, would not be ground for impugning the validity of the deed. But it is not by any means clear that one party had much advantage over the other in this respect. They both knew very well that chrome could be got there, which one wanted and the other had no use for. But the whole extent of it in quantity was probably not known to either of them for some time after the deed. When it was discovered that sand chrome was as valuable as the same mineral found in the rock, and that large quantities of the former could be got in certain parts of the fast land as well as by the

streams, it was natural enough that the plaintiff should repent and the defendant rejoice over the contract; but this did not touch its validity. Every man must bear the loss of a bad bargain legally and honestly made. If not, he could not enjoy in safety the fruits of a good one. Besides, we do not feel sure that the contract has made the plaintiff any poorer, for it is not improbable that he would never have discovered the value of the mineral deposit on his land if he had not granted to the defendant the privilege of digging.

2. If the defendant, during the negotiation for the purchase, willfully made any misstatement concerning a material fact, and then misled the plaintiff and induced him to sell it at a lower price than he otherwise would, then the contract was a cheat and the deed is void utterly. But in all cases where the evidence brings the parties face to face, the language and conduct of the defendant seem to have been unexceptionable. An offer was made and rejected to prove that Tyson had made certain statements in the neighborhood which were calculated to produce the impression that all the chrome in that region was not very valuable. It was even proposed to be shown that he had spoken in depreciating terms of sand chrome on a track adjoining Harris'. It would at least have been useless, and it might have had a pernicious influence on the minds of the jury, to have admitted such evidence. To invalidate a solemn deed by showing that misrepresentations were used to obtain it, there must be very clear proof that the falsehood was told directly or indirectly to the grantor. It is not to be supposed that he was influenced by a statement neither made to himself nor communicated to him. If the vendee's conduct in all his transactions with the vendor was honest and fair, he is not answerable in this action for what he may have said elsewhere to other persons.

3. Mere inadequacy of price is not sufficient to set aside a deed. It is sometimes regarded as a suspicious circumstance when coupled with other strong evidence of fraud. Here it would hardly be entitled to that much consideration. The sale of this privilege at a low price is explained by so many reasons that it is not necessary to account for it by supposing there was any foul play. But it is enough to say that the plaintiff had a right to sell at what price he pleased or keep

his property. Having chosen to do the former, he can not undo it by changing his own mind.

4. The allegation of duress is founded on these facts: Before the date of the deed now in question, Harris made a written contract with Tyson to sell him his land out and out; but he refused to make the conveyance, and Tyson declared that he would bring an action on the covenant. The difficulty was then settled by the cancellation of the agreement, and the execution of the deed granting the mineral right. The court received this evidence, and most properly instructed the jury that duress to invalidate the deed must be of the person. For the plaintiff it was insisted that the deed might be avoided merely by proving a threat to sue the grantor for a good cause of action. There is not only no judicial decision in favor of this opinion, but I think it is new even as an argument at the bar.

This is the whole body of the case. There is nothing else of leading importance in it. Yet the judgment is brought here on no less than thirty-nine exceptions.

The 1st, 2d, 4th, 5th, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 15th, 16th and 39th disclose a succession of struggles to get in evidence of Tyson's declarations concerning sand chrome on other lands in the same neighborhood. These declarations may have had a tendency to impress the minds of those who heard them, and who knew nothing on the subject from other sources, with the opinion that sand chrome was worthless, but they had no connection with, and no relevancy to the purchase from Harris, except that his land had the same kind of mineral in it. No attempt or offer was made to show that Harris ever heard these statements from Tyson, or heard of them from anybody else.

The 3d is the rejection of evidence that the plaintiff was a poor man. It is impossible to see what this had to do with the merits of the case. It could not strengthen any more than it could weaken his title to the property in dispute.

The 6th points us to an exception, by which we find that the defendant filed of record a disclaimer of all right to the land except the privilege of taking out chrome. It is not denied that this put the dispute on its true ground. The defendant had a right, and perhaps it was his duty to file it.

Certainly it did the plaintiff no harm. The bill of exceptions does not say that the paper was read to the jury.

The 17th and 18th were offers to prove conversations of Tyson, but what the conversations were, was not stated, nor so much as hinted at. It is impossible for us to make anything out of exceptions like these.

The subject of the 19th was a proposal to prove a transaction between two other parties, who were altogether strangers to this business. It was about chrome, to be sure; but it could have thrown no light on the subject under investigation. It was not only a bargain between other parties, but it was five to nine years later in time than the contract between Harris and Tyson, and the bill of exceptions does not even show what its terms were. We take it for granted that this offer was not made for the purpose of showing the disparity between the value of Harris' ore and the price he got for it, because the court gave the plaintiff leave to prove all he could on that subject, and the very witness of whom the question was asked, testified fully and directly to the point.

In the 20th we see an offer to prove that it was Tyson's declared intention to monopolize the chrome business. This is somewhat indefinite. If Tyson really thought he could get a monopoly in the proper sense of the word, that is, a law forbidding all persons but himself from engaging in such an enterprise, he is not the shrewd man he is represented to be, and his fancy was a very harmless one. If he intended merely to carry on the manufacture of chrome so largely and sell it so cheaply that no one would think it worth while to compete with him, then he is a meritorious citizen. He has a right to all he can win by his science, labor and capital honestly employed. Either way, the evidence offered could serve no purpose except to waken prejudices which had better be allowed to sleep.

The letter mentioned in the 21st specification was properly admitted. Its contents were communicated to Harris pending the negotiation, and show how it was conducted. After all that was said about foul play in getting the bargain, to withhold from the jury this clear and direct evidence of Tyson's fair dealing would have been gross injustice to him.

The remaining specifications refer to the charge. Those

numbered from 22 to 37 inclusive, are intended to particularize the several mistakes which the judge fell into, and the 38th makes the sweeping assertion that the whole scope and tenor of the charge is erroneous. Of all the specific errors assigned we do not find one which we would feel justified in calling an error, and the charge, as a whole, is impartial and sound. It contains so convincing a refutation of the views which the plaintiff's counsel took of the case, that we wonder they were not perfectly satisfied with it.

Judgment affirmed.

JENKINS v. REDDING.

(8 California, 598. Supreme Court, 1857.)

[1] **Lien claimed by representer of claim.** Where plaintiff contracted verbally with the owner of an interest in a mining claim to represent his interest at a certain rate, to be paid out of the proceeds: *Held*, that his contract created no lien against an innocent purchaser, without notice.

Possession of employe no notice. The possession of an employe is that of his employer, and does not operate to give notice of his equities.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was a suit in equity, for the purpose of enforcing a lien which the plaintiff claimed on the one twenty-fourth interest of the defendant in the Oregon Mining Company. The facts are as follows:

Ames and Buss, then owning one twelfth interest in said company, made a verbal agreement with plaintiff, Jenkins, to work their interest in said company, for which Jenkins was to have five dollars per day, to be paid him as it was taken from the claims.

Plaintiff went to work under this contract, and labored for a long period, sometimes representing his employers' interest at the meetings of the company, and drawing a part of the dividends, which were much less than five dollars per day.

While plaintiff was at work, Buss, owning one twenty-fourth

[1] *Brunswick* v. *Winter*, 5 Pac. 706.

interest, sold it, and the defendant became invested with the interest of Buss, without notice of plaintiff's contract. The court below decided that plaintiff's possession was notice to defendant, and rendered a decree in favor of plaintiff. Defendant moved for a rehearing, which being denied, he appealed.

[1]VAN CLIEF & STEWART and J. R. MCCONNELL, for appellant.

FRANCIS J. DUNN, for respondent.

TERRY, C. J., delivered the opinion of the court, BURNETT, J., concurring.

The question in this case is, whether a lien for labor under a verbal contract can attach to a mining claim, so as to be enforced against such claim in the hands of an innocent purchaser, without notice.

We think the simple statement of such proposition its best refutation.

It is said that the plaintiff was in possession of the claim, and that his possession was a notice of his equities.

The answer to this is clear. He was employed to labor on the claim, and was in possession for that purpose only; he was a mere agent or servant, and his possession was the possession of his employer.

The judgment of the court below is reversed, and plaintiff's bill dismissed.

[1]The arguments of counsel were confined to whether or not the contract was within the Statute of Frauds. No claim was asserted under any mechanic's lien statute.

HITCHENS ET UX. v. NOUGUES ET AL.

(11 California, 28. Supreme Court, 1858.)

[1] **Possession under contract.** Parties can not take and hold possession of a mining claim as vendees and be upheld in refusing compliance with their contract made in consideration of their receiving such possession and the right thereto.

Pretense of outstanding title. Where one of the plaintiffs sold to defendants a certain quartz lode, in which he in fact owned no more than four sevenths, but the defendants knew this when they purchased and bought in the outstanding interests for little or nothing, having treated them at the outstart as abandoned: *Held*, that they could not set up outstanding title to defeat specific performance.

After-acquired title. Where defendants bought a quartz lode and as consideration granted to the wife of the vendor one third interest in the land, and afterward bought in an outstanding title known to exist at the time of the contract for little or no consideration: *Held*, that their subsequent purchase inured to the benefit of their vendee, the wife of the original vendor.

Appeal from the District Court of the Eleventh Judicial District, County of El Dorado.

A statement of the facts sufficiently appears in the opinion of the court.

COFFROTH & HEWES, for appellants.

SANDERSON & NEWELL, for respondents.

BALDWIN, J., delivered the opinion of the court, FIELD, J., concurring.

This was an equity proceeding, brought by respondents for a rescission of a contract made by Hitchens with the defendants in regard to a certain mining claim, or for a specific execution of the contract, with which is connected a prayer for account. The case was tried by the judge on bill, answer and proofs, and a decree rendered in favor of the complainants. No demurrer was filed. The contract was made with Hitchens, who, it would seem, was the owner, or contracted as the owner of the premises sold to the defendants. There appears to be an evident incongruity in the bill in this, that complain-

[1] *Clarke* v. *Wilson*, 15 Ves. 317.

ants, Hitchens *and wife*, sue to set aside or rescind the contract made by *Hitchens alone* with defendants. Hitchens, at the time of making the contract, being solely interested in the subject of the contract, and yet Hitchens and wife assert the right of the wife to enforce the contract *as made*, the wife deriving her right to intervene from the fact that, by the contract and the deed executed under, or as a part of it, she was entitled to a certain portion of the property sold, and a share of the profits of the business of mining proposed to be carried on afterward. In consideration of the deed of Hitchens to defendants, they conveyed to Mrs. Hitchens one third of the mining claim described in the bill, and they also agreed to account in a certain manner with her for the profits arising from working the claim. In one aspect of this claim, it is apparent that Mrs. Hitchens would not be interested as a plaintiff; in the other, she would. But as this point was not taken by demurrer, or in any other form, on the trial, we will proceed to consider the case as the district court considered it, viz., as a bill for specific performance. The case is simple and without difficulty. The record shows that Hitchens claimed and was in possession of a mining claim, or quartz lode, in the county of El Dorado; that he entered into a written contract with Nougues and Smith, by which he purported to sell to them all his right, title and interest in this claim. In consideration of this conveyance and contract, Nougues and Smith executed an instrument under seal, on the 15th of September, 1857, whereby they granted, bargained and sold to Mrs. Hitchens and her heirs and assigns, forever, one third part of the premises in dispute. This deed is averred to be in consideration of a sale and transfer, by deed and delivery of possession of the right, title and interest of John Hitchens of this claim, and also a nominal consideration of five dollars from Mrs. Hitchens to the grantors. The court especially find that, under and by virtue of Hitchens' conveyance to the defendants, they took possession of the claim. The deed proceeds as follows:

"And we, the said parties of the first part, for ourselves, our heirs, executors, administrators and assigns, in consideration aforesaid, do covenant, stipulate and agree, with and to the said party of the second part, her heirs, executors, administra-

tors and assigns, that the said parties of the first part will erect, establish and put in operation, within twenty days from the date of these presents, upon said quartz lode, a quartz crushing mill which is now owned by said parties of the first part, and at work near the village of Kelsey, being a two stamp mill, known as Cummings' Portable Mill, and that said parties of the first part will run said mill diligently, crushing quartz from said lode, and manage and conduct the same in a prudent and economical manner, and will pay over to the said party of the second part one third part of the net proceeds of said mill, after paying out of the gross yield all expenses necessarily incurred in procuring quartz and crushing the same, which payment of one third of the net proceeds as aforesaid, to said party of the second part, shall be made at each and every washing or cleaning up of gold at said mill. And the said party of the second part shall have the right and privilege, at any and all such washings or cleaning up, of being present, either in person or by agent, for the purpose of inspecting and ascertaining the amount of such yield, and shall, at any and all reasonable times, have access to the books of the concern, and may examine said parties of the first part, or either of them, or their agent or clerk, on oath, respecting the condition of the accounts of the concern."

"It is further covenanted, stipulated and agreed by the said parties of the first part, for themselves, their heirs, representatives and assigns, with and to said party of the second part, her heirs, representatives and assigns, that should there be at any time an increase of shares of stock in said quartz lode, or should new and additional partners be admitted into the concern, or should a joint stock company be formed for the purpose of improving and working said quartz lode, that in any such case said party of the second part is to share in the advantages and profits of any and all such arrangements with said parties of the first part, in proportion to their several interests. And if, in any such case, money or property is realized by reason of such arrangement, said party of the second part shall be entitled to and shall have one third of such money or property."

"And said parties of the first part further covenant and stipulate with and to the said party of the second part, her

heirs, representatives and assigns, that said business shall be carried on and conducted for the benefit of the said several parties to these presents, as aforesaid, in a fair and economical manner, without incurring any unnecessary expense or outlay in conducting the same."

"In witness whereof, we, the said parties of the first part, have hereunto set our hands and seals, this day and year first above written.

"J. M. SMITH, [L. S.]
"JOS. NOUGUES, [L. S.]"

"Witness: EARL S. POWERS."

Smith and Nougues, after going into possession, gave, by advertisement, notice to all persons concerned, that they would sell the shares in this claim, if payments were not made of the assessments due on such shares by the time of sale—10th January, 1858. It is also found by the court that Nougues and Smith did not, within twenty days after the date of the contract, nor at any time, erect the portable mill described in the agreement; but in lieu of it, proceeded to erect a large and costly mill, with eighteen stamps, without the consent of the plaintiff, except so far as that consent might be inferred from the knowledge of the latter that the mill put up was being built and his making no objections thereto. It appears, further, that at the date of the deed to defendants, Hitchens was the owner of only four sevenths of the quartz lead; but it was found that defendants knew at the time of the purchase that Hitchens had only this interest; and that they took the risk of the other interests being forfeited or abandoned; and it is further found that these outstanding claims were bought after this contract, and by the terms of the purchases they were only to be paid for if the defendants succeeded in this suit. The defendants retaining the possession, refused to render any account, and claimed to hold the premises in their own right, unaffected by the stipulations of the contract. The court below rendered a decree declaring the right of the plaintiffs to enforce the contract, and for an account. This decree is appealed from.

The court below was clearly right upon the construction given to the evidence after hearing the witnesses, who were not entirely agreed in their statements. On looking over the

proofs we are by no means satisfied that the court below erred in its conclusion of facts; but as there was some conflict in the testimony, we are not disposed to interfere, unless it is clear that the district judge, whose opportunities for judging the value of, and weighing correctly the evidence, are better than ours, erred in his decision upon it.

The defendants, having taken possession under Hitchens, can not retain that possession, and refuse compliance with their agreement made in consideration of such possession and right to it. This is a plain, and, we believe, almost universal principle of law. But beyond this, it seems that the defendants only contracted, not for the title to the premises, but for the right and interest of Hitchens; and this they got; and still more, by force of this possession, doubtless, they were able to acquire, for what is equivalent to little or nothing, the outstanding interests; for not getting which immediately from Hitchens they claim a right to refuse performance of their covenants. Nougues is evidently estopped by his deed (and Smith, too, if he executed the deed, and we think he did in effect, for he says in his answer that the deed is sufficiently executed to pass title to Mrs. Hitchens).

It follows, therefore, that under the statute of 1855, whether Nougues and Smith had title or not, at the time of their deed to Mrs. Hitchens, having conveyed to her by deed purporting to convey in fee simple absolute, their subsequent acquisition of title inured to her benefit.

The only question about which there can be any doubt is whether, as Nougues and Smith did not put up the sort of mill intended in the contract, but another and more costly one—if it appeared on the final hearing that the complainant has made or lost by this change, or if she did or did not assent to it—whether the proper expenditure for this, or the value of its use, or the injury for not putting on the premises the mill stipulated for, should be taken into the estimate in settling the account. But this matter can be better determined on the final settlement of the accounts when the facts are more fully developed.

The judgment is affirmed.

HOEVELER v. MUGELE ET AL.

(66 Pennsylvania State, 348. Supreme Court. 1870.)

[1] **Evidence of payment out of stock proceeds allowed.** In an action on a bond for purchase money of land, evidence for defendant, that the land was to be the basis of an oil and mining company, that the sum secured was to be paid when realized from the sale of stock, or, if the stock could not be sold, from the products of the land, is admissible.

Judgment lien confined to specific property. Under the precedents in Pennsylvania, in a proper case the lien of a judgment and the execution on the judgment may, by the verdict of a jury, be restricted to specific lands, articles or proceeds.

Error to the Court of Common Pleas of Allegheny County.

On the 23d of February, 1867, Augustus Hoeveler brought an action of debt against Charles P. Mugele, Adam Becker, Raymond Schaffer, William Euler and Ludwig Schmidt. The plaintiff having died, Elizabeth Hoeveler, his administratrix, was substituted.

The cause of action was the following instrument, signed under seal by all the defendants, and dated November 7, 1865:

"On or before the first day of May next (1866), we jointly and severally promise to pay to Augustus Hoeveler, of the county of Allegheny, or his assigns, the sum of two thousand two hundred and eighty-five dollars and seventy-two cents, together with interest from this date, it being in full payment for the purchase of six hundred acres of land on the east side of Cheat river, below Rowlesburg, in Preston county, West Virginia, this day conveyed to us by him; for the true payment of which we bind ourselves," etc.

On the trial, before MELLON, J., the plaintiff read the note in evidence, and rested.

The defendants then offered to prove that at the time the note was executed it was understood between all the parties that the land, for a part of the purchase money of which the note was given, was to be conveyed by defendants, together with other lands held by them, to an oil company about to be

[1] *Waterman* v. *Waterman*, 15 M. R.—

formed, and that plaintiff would depend for payment of his note upon the sale of shares in the oil company, and, failing that, upon the sale of timber and mineral products of the company's lands. The plaintiff objected to the testimony; it was admitted, and a bill of exceptions sealed.

The testimony was in accordance with the offer. It is stated in detail in the opinion of Mr. Justice Read.

The verdict was for plaintiff for $2,771.07: "The lien and execution of any judgment upon this verdict, to be restricted and confined to the proceeds of sales of shares and products of the lands of the Pittsburg Lumber, Oil and Mining Company, situate in Preston county, West Virginia, and in default of payment thereof out of such proceeds and products, then to the said lands of said company," subject to the opinion of the court on the question of law reserved. May 22, 1869, the plaintiff's counsel moved the court to strike out all that part of the verdict which follows the amount found by the jury, and to enter judgment on the verdict so amended. September 28, 1869, the motion to amend the verdict dismissed, and judgment on the verdict in favor of the plaintiff on the points of law reserved.

The plaintiff took a writ of error, and assigned for error:

1. Refusing the plaintiff's motion to amend the verdict, and enter judgment on the same as amended.

2. Directing judgment to be entered on the verdict.

3. Admitting the defendant's offer of testimony to contradict the written contract sued on.

J. F. SLAGLE and H. BURGWIN, for plaintiff in error.

A. M. BROWN, for defendants in error.—To refuse performance of a promise made to obtain a written instrument is a fraud which can not be taken advantage of: *Campbell* v. *McClenachan*, 6 S. & R. 171; *Morrison* v. *Morrison*, 6 W. & S. 516; *Miller* v. *Henderson*, 10 S. & R. 290. Oral evidence may be given of what occurred at the execution of a contract: *Rearick* v. *Rearick*, 3 Harris, 66; *Renshaw* v. *Gans*, 7 Barr, 117; *Chalfant* v. *Williams*, 11 Casey, 212; *Bank* v. *Fordyce*, 9 Barr, 275; *Rearich* v. *Swinehart*, 1 Jones, 233; *Barnhart* v. *Riddle*, 5 Casey, 92; *Musselman* v. *Stoner*, 7 Id. 265; *Boyd* v. *Breece*, 3 Phila. 206; *Parke* v. *Chadwick*, 8 W. & S. 98.

The opinion of the court was delivered January 3, 1871, by READ, J.

This was an action to recover the sum of $2,285.72, with interest, upon a bond executed by the defendants, promising to pay that amount to the decedent, it being in full payment for the purchase of 600 acres of land, on the east side of Cheat river, below Rowlesburg, in Preston county, West Virginia, this day conveyed to us by him. It is dated the 7th November, 1865, and the defense shows it was a part of a plan to organize an oil company, and the defendants offered parol evidence of what occurred between the parties at and immediately before the execution of the instrument. This was objected to by the plaintiffs, but the learned judge admitted the testimony and sealed a bill of exceptions.

The evidence thus admitted showed that Augustus Hoeveler, being the owner of 600 acres of land on the east side of Cheat river, in Preston county, West Virginia, proposed to the defendants the organization of the "Pittsburg Lumber, Oil and Mining Co.," with said land and other lands of the defendants as a basis, and for that purpose, and preliminary to said organization, to convey his land to defendants for said company, at the nominal consideration of $6,000, payable as follows, viz.: $3,714.28 in stock, and the residue, $2,285.72, in cash, when realized by sale of stock to outside parties; and in case the stock could not be sold, then Hoeveler was to look to the products of the land, to wit, timber, lumber, etc., to be obtained from the land, and in the meantime the defendants were to give their note for said sum of $2,285.72, as a voucher for amounts to be paid, and because there were no officers of the company to issue such obligation. The defendants also agreed to take stock for their lands, and all the parties were to share in the profits, according to their *pro rata* interest in their adventure. The company was organized and chartered, mills erected, and other things done in furtherance of the common object; but they were unable to sell sufficient stock to pay the Hoeveler note, and evidence was given tending to prove that the failure was attributable to the default of Mr. Hoeveler.

This evidence was clearly admissible, and to have excluded

it would have been permitting the commission of a fraud upon the defendants.

The jury found a verdict for the plaintiff, with this restriction: "The lien and execution of any judgment upon this verdict, to be restricted and confined to the proceeds of sales of shares and products of the lands of the Pittsburg Lumber, Oil and Mining Co., situate in Preston county, West Virginia, and in default of payments thereof out of such proceeds and products, then to the said lands of said company," following the memorable examples of *Aycinena* v. *Peries*, 6 W. & S. 243; *Irwin* v. *Shoemaker*, 8 Id. 75.

This verdict was perfectly right, and in entering judgment upon it the court committed no error.

Judgment affirmed.

MAWSON V. FLETCHER.

(L. R. 6 Ch. App. 91. Court of Appeals in Chancery, 1870.)

[1] **Reservation of minerals constitutes defect in title—Prospect of litigation a ground to resist specific performance.** Upon a sale of freehold land described as containing valuable limestone and freestone, one of the conditions provided that the purchaser should be considered to have accepted the title, unless he should, within a certain time, deliver to the vendor some valid objection to the title, and that if any objection or requisition should be delivered and persisted in, the vendor might rescind the contract; and another condition provided that if any mistake should appear to have been made in the description of the property, or the vendor's interest therein, it should not vitiate the sale, but compensation should be given. The vendor's title deeds contained a reservation to the lord of the manor of the right to the mines and minerals under part of the property; but the vendor asserted that by the custom of the manor, the lord's right did not extend to limestone and freestone, and that there were no other minerals under the property; the purchaser having claimed compensation, the vendor rescinded the contract: *Held*, that the purchaser's objection involved a question of title between the vendor and the lord of the manor, and that the vendor was entitled to rescind the contract, and a bill by the purchaser for specific performance, with compensation, was dismissed.

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[1] *Anderson* v. *Kennedy*, 51 Mich. 468; *Reddington* v. *Henry*, 3 M. R. 31.

This was a suit by a purchaser of land for specific performance of the contract, with a deduction from the purchase money.

The land was bought at a sale by auction. It was stated in the particulars to contain freestone and limestone. The 5th condition of sale provided that any part of the property which had been enfranchised would be sold subject to reservations contained in the deed of enfranchisement; the 6th condition enabled the vendors to rescind, if any objection or requisition was persisted in; and the 14th condition provided for compensation in case of any error or mistake in the description of the property, or of the vendors' interest therein.

The purchaser investigated the title and delivered requisitions thereon, by one of which he claimed compensation for the mines and minerals under the land as being, by one of the title deeds, reserved to the lord of the manor. The vendors answered that the reservation contained in the deed was the result of an enfranchisement and would not be compensated for. The purchasers still claimed compensation, which the vendors refused, offering to rescind if the purchaser considered that he had been misled. Ultimately, the solicitors for the vendors, on the 1st of March, 1869, wrote to the solicitors for the purchaser, stating that unless the title was accepted unconditionally before the end of that week, the contract would be rescinded, pursuant to the conditions of sale. No answer was sent, and the solicitors for the vendors wrote again on the 8th of March, inclosing a check for £246 for the deposit, and stating that from that date the contract for sale would be considered as rescinded. The solicitors for the purchaser returned the check, insisting upon performance with compensation, and the purchaser then filed the bill in this suit for specific performance with compensation. The vendors, by their answer, alleged that they had a good title to the minerals, but had rescinded the contract. The master of the rolls dismissed the bill with costs, as reported (Law Rep. 10, Eq. 212), where the facts are fully stated.

The plaintiff appealed.

Mr. SOUTHGATE, Q. C., and Mr. DRYDEN, for the appellant. —We say that this case comes clearly under the condition

as to misdescription, which is not over-ridden by the condition for rescinding: *Painter* v. *Newby*, 11 Hare, 26. If this course can be adopted, the condition as to misdescription is rendered nugatory, for every case involving compensation must arise from a defect of title to part. The condition expressly refers to the "vendors' interest," which shows that it was not to be confined to a misdescription in the quantities of land sold. This is a clear case of misdescription: *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Hoy* v. *Smythies*, 22 Beav. 510. We say that freestone and limestone are minerals and are reserved to the lord. The vendors did not at first deny this, and only said, in fact, that we were bound by the 5th condition as to enfranchisement; but that certainly did not apply, and it was not till the vendors put in their answer that they claimed to have a good title to the limestone and freestone.

(The Lord Justice MELLISH.—The vendors, in fact, say that they have a good title. You may not be satisfied with it, and insist on allowing an expensive inquiry; but they may find another purchaser who will be satisfied, and therefore they rescind the contract. It may be conceded to you that if there was a clear case of defect of title to part, you would be entitled to specific performance with compensation; but it is not so, and we can not now make a decree for specific performance with compensation, inasmuch as there must first be an inquiry whether the vendors have a title; that inquiry will probably be long and expensive and be the very thing which the vendors wish to avoid.)

We should have to pay the expense of that inquiry if the vendors turned out to have a good title. As the vendors have misled us, the *onus* is on them to show that they have a title, and they are not justified in arbitrarily rescinding: *Turpin* v. *Chambers*, 29 Beav. 104; *Duddell* v. *Simpson*, Law Rep. 2, Ch. 102. They never said that they claimed these minerals, and if they had admitted that they had no title to them we must have had a decree for specific performance with compensation.

Mr. JESSEL, Q. C., and Mr. JACKSON, for the defendants, were not called upon.

Sir W. M. JAMES, L. J.

It appears to me that the decision of the master of the rolls ought to be affirmed. This was a sale by auction upon certain conditions, one being that "if any objection or requisition be delivered and persisted in, the vendors shall be at liberty to rescind the contract on returning to the purchaser his deposit, without interest or expenses." The property was about forty acres, and was said to contain limestone and freestone, and there was also a condition as to the enfranchisement. Now, upon investigation of the title, it appeared that upon one of the deeds there was a notice of the rights of the lord of the manor to minerals; and on further investigation an old deed was produced which contained words purporting to reserve to the lord of the manor all mines and minerals whatsoever, raising, therefore, a presumption that the reservation of the rights was of the same rights as those on the customary land, which, it was said, included freestone and limestone. This was a very serious objection to the title. The land is described as containing very valuable limestone and freestone, and, no doubt, they would be valuable to a purchaser. Then there was the question whether the vendors could or could not, by adverse possession or otherwise, make out a title to the freestone and limestone. That is as much a question of title as if it related to any portion of the surface, and is a question of title to a particularly valuable part of the property.

The first answer was, that the question was covered by the 5th condition, but that would not be enough in this court to enable the vendors to force such a title upon an unwilling purchaser; and therefore the vendors virtually say that in their opinion it is covered by the 5th condition, but if the purchaser considers that he has been misled, then the vendors will rescind the whole contract.

That appears fair and proper, but giving that answer did not make it the less an objection for want of title. The objection was persisted in, and the vendors give a week's notice of their intention to rescind; the vendors write again, and receive no answer, except that the purchaser persists in the objection.

He now claims compensation, and yet says it is not a question of title, though he claims because there is a defect of title to part of the thing agreed to be sold. The vendors, on the

other hand, may say that the very reason why they put in that condition was to avoid going into a long and expensive inquiry. The thing to be ascertained would be the extent of defect in title. Suppose it turned out that the freestone and limestone did not belong to the lord of the manor, but that the coal did; then the compensation would be different, and the vendors wished to be protected from all these difficulties.

It is true that the vendors could not make such a contract, and avail themselves arbitrarily of this condition to put an end to it; but in this case it is impossible not to see that they would be involved in very considerable trouble and expense by such an inquiry as would be necessary.

I can not say that they were not entitled to give this notice to rescind; they seem to have given it *bona fide*, and the plaintiff brought it upon himself. He filed his bill as entitled to compensation. The master of the rolls held him not entitled, and we are of the same opinion. The bill ought to be dismissed with costs.

Sir G. MELLISH, L. J.

I am of the same opinion. The objection raised by the plaintiff is, that the title to the freestone and limestone under part of the property sold can not be made out, because it appears on one of the deeds that these minerals had been reserved to the lord of the manor; and it is not the less an objection to title because, instead of stating it as such, the purchaser claims compensation. The real question is, whether the objection is an objection to title or merely as to a misdescription, because it does not extend to the whole property. (His lordship then read the 6th condition, and observed that it was in the most general terms. He then read the 14th condition.) Now, is there any error or mistake in the description? There is a general description, and also a description of this particular lot, but as to a material and essential portion it appears that the vendors have not a title, at least the objection is made that they have not the title, which is said to be in the lord of the manor. Now, that is an objection to title; the description is accurate, but the vendors can not make out a title.

An answer was made which referred to the 5th condition. That was not a sufficient answer. The purchaser still insisted on the objection, and claimed compensation; and the vendors, by their letter of the 1st of March, gave the purchaser the opportunity of saying that he would take without compensation, which Lord Cairns, in *Duddell* v. *Simpson*, L. R. 2 Ch. App. 102, says ought to be given.

The purchaser never answered that letter, thereby admitting that he was not disposed to waive the objection. He allowed the time to go on, and then the vendors' solicitors wrote another letter, stating that the contract was rescinded. That I take to be rescinding the contract under the conditions; and in my opinion, the plaintiff had no right to file this bill, which was very properly dismissed by the master of the rolls.

LOGAN v. DILS.

(4 West Virginia, 397. Court of Appeals, 1870.)

[1] **Optional contracts of sale—Intermediate buyer entitled to advance in price.** L., a non-resident, owned lands in West Virginia. D., his brother-in-law, residing in the State, wrote to him that he would take the land at $10 per acre, or to put his price per acre on the land, and he would sell it for what he could above that sum and retain the excess as compensation. L. replied by letter that he would take $10 per acre. D. telegraphed that he would take the land, and sent him his notes for the whole amount, which L. accepted and retained. Subsequently, and before the notes were due, D. sold the land for $20 per acre. L. refused to make a deed upon D.'s offering to pay off the notes, but it was agreed that the vendee of D. should pay off the notes, which was done, and the residue of the purchase money on sale between D. and the vendee, was deposited in bank to await the result of the controversy between L. and D., and the notes were also deposited in bank. These notes were subsequently withdrawn from the bank by L. D. filed his bill for specific performance, charging a sale between L. and himself in the nature of what is called "optional contracts of sale." L. claimed the transaction was one of agency on the part of D. The court below decreed that there was no sale between them, but allowed five dollars per acre as a compensation to D. for services. On appeal by L.: *Held*, that it was a sale at $10 per acre; but inasmuch as D. did not insist on the error of the court below in decreeing that there was no sale, he

[1] An "option" does not necessarily imply want of mutuality: *Corson* v. *Mulvany*, 49 Pa. St. 88; 88 Am. Dec. 485.

thereby waived the error in the decree in that particular, and it was affirmed.

Stamping of contract, retroactive in operation. A contract may be stamped after suit brought on it.

This was a suit in chancery brought by William Dils against Samuel Logan, in the Circuit Court of Wood County. The bill was filed at February rules, 1865. It alleged that the complainant resided in Wood county and the defendant in Missouri; that the latter was the owner, in 1864, of several tracts of land in Ritchie and Pleasants counties; that the complainant was then engaged in buying and trading real estate supposed to contain oil or valuable minerals; that he proposed, in a letter to the defendant written September 27, 1864, to buy the lands, either at a fixed price of ten dollars per acre, or to take the lands at the lowest rate or figures fixed by the defendant, the complainant to sell the land, and the excess above the price to be retained by, or belong to, the complainant, in the nature of what was sometimes called "optional contracts." That the defendant replied to this letter, under date of October 7th, that he was willing to take ten dollars per acre; that upon the receipt of this letter the complainant telegraphed to the defendant on the 17th of October, closing with the offer of ten dollars per acre, and drew his two negotiable notes, payable in seventy-five and one hundred days, for $9,395 each, and forwarded them to the defendant, who received and accepted them in part performance of the contract, and requested a deed from the defendant; that on the last mentioned day the complainant sold the lands for twenty dollars per acre; that in a few days the defendant came to Wood county and expressed his gratification at the prospect of getting ten dollars per acre for lands which he had but recently offered at one dollar and fifty cents per acre; that afterward, in December, 1864, the defendant refused to make a deed to the vendee of the complainant, at the request of the complainant, when the latter was willing to lift his negotiable notes, although not due, but was willing to make a deed to the vendee at the price of ten dollars per acre, adopting the contract of the complainant as his own, but refused to perform the contract with the complainant; that it was then agreed that the vendee should pay off the notes of the complainant, which was done, and that the

residue of the money due on the contract between the complainant and the vendee should be deposited in bank to await the result of the controversy between the complainant and defendant, and that it was further agreed that the defendant should make a deed to the vendee for the lands at the price of ten dollars per acre, upon condition that the defendant would deposit the complainant's notes in bank after they were lifted; but that the defendant afterward took them out of the bank and still retained possession of them, although they were paid off under the agreement. The bill charged that the defendant denied any sale to the complainant, but had several times offered to pay him $10,000 and $12,000. It asked that the defendant be required to carry out his contract with the complainant specifically, and that the sum of $18,835 on deposit in the bank, be decreed to the complainant, and the further sum of $19,000 damages for the non-compliance.

The answer set up that the complainant was the brother-in-law of the defendant, and as such had done some business for him as agent in Wood county; that he had been absent for some time from that county, and was not aware of the rise in value of wild land supposed to be valuable for oil purposes, and not thinking the complainant would conceal important information from him as to the true value of the lands he wrote the letter of October 7, 1864, not intending it to be regarded as a contract of sale, but an indication of willingness to take the price named as he was then advised as to the value of the land.

The answer denied any contract for the sale of the lands, and alleged an agency simply in the complainant and that he had grossly misrepresented, deceived and misled the defendant, and had concealed important information with reference to the sale of the lands, and in violation of his confidential relations, etc.; that he well knew at the time he made the agreement with the defendant that he had already sold the land at the price of twenty dollars per acre, and if any contract had been made with the complainant, it was void by reason of his fraudulent concealments and misrepresentations. The answer also alleged that the pretended contract was not stamped with a revenue stamp as required by act of Congress. The bill set out the letter of the defendant of October 7,

1864, to which was annexed the certificate of the collector of internal revenue, stating that, believing the instrument to have been issued without being stamped, through inadvertence, and not from any intention to defraud the revenue service, he thereupon caused the proper stamp to be affixed and canceled on the 7th day of June, 1865.

In October, 1865, the court below decreed that there was no valid contract of sale between the parties, and therefore a specific performance was refused, but the cause was referred to a master to report the compensation for the services in making the sale that was due the complainant, with leave for either party to introduce proof in relation thereto. The master reported in March, 1866, an allowance of ten per centum on the gross sum realized. The complainant excepted to the report. Considerable testimony was taken by the master on the question of compensation of prominent real estate dealers and others, which was quite conflicting. The court sustained the exceptions and decreed, in June, 1866, that the complainant be allowed the sum of five dollars per acre for services in making the sale, which amounted to $9,120.

The defendant filed a bill of review, alleging that the subject of the decree last mentioned, *i. e.*, the compensation, was plainly inconsistent with the whole object, scope and design of the bill, and therefore it was erroneous, as the basis of relief granted was not set forth in the bill.

To this bill the complainant demurred, and the demurrer being sustained, it was dismissed.

The defendant appealed to this court.

The evidence upon which the question involved, as to whether it was a sale or not by the defendant to the complainant, was mainly letters and a telegram, which are as follows:

"PARKERSBURG, September 27, 1864.

"SAMUEL LOGAN, ESQ.,

"Palmyra, Missouri:

"*Dear Sir:*—I have been expecting a letter from you for some time, but have not heard from you but once since you returned from Chicago; then you declined selling your French creek lands. I have not sold any more lands since I last wrote, but have rather a big thing on hand. I have been trying to throw all of yours, Patterson's and my own into a company's

hands, at a big price, and they propose to take the land and pay all it is worth, in cash, and then want us to take stock in the company. It is the way that fortunes have and are being made. I could have made some money out of your Cow creek and Goose creek lands, by taking a third party, who is operating with those companies, but you — to oil them right well to get them to work for you. Now how much will you take all around for your land, per acre, and allow me what I can make over, for the contingencies? Will you take $10 per acre for both tracts? Of course cash in hand when the deed is made. I do not know that I can get it, although I have no offer for it yet. Patterson talked to me as if he would be very glad to take that, though he said that you had offered him your half for $1.50 per acre. Now he has authorized me to sell his with yours, if I can make the sale, at whatever rates that I sell yours at. Now put your limit at whatever you will take, allowing me the balance to cover the use of the expenses of sale, etc., and if any purchasers come there after it, do not sell unless you are getting perfectly satisfactory figures. The way that I have been working and figuring for some time, I believe I can make about as much money out of it now as anybody else who does not buy to go into a company. Now if you want to sell it, I think that I can get $10 per acre for it all, especially if I can work it into a company, and perhaps make expense of selling beside. Money is nothing here now with oil men. Write and put your limit on, and if I can gouge those fellows for my own benefit, I shall do it. Yours truly,

"WILLIAM DILS."

The reply of the defendant to this letter is as follows:

"PALMYRA, Mo., Oct. 7th, 1864.

"WM. DILS, ESQ., Parkersburg.

"*Dear Sir:*—Your favor of the 27th September has just been received, after being out ten days. I wrote yesterday concerning a claim I had in Pleasants county office, on J. H. Henderson; in reference to the French creek and Goose and Cow creek lands, I am willing to take $10 per acre, and if you can get up any kind of an arrangement by which you can skin some of those northern chaps, go on, I am willing. From the tone of your letter I suppose you must have a pretty good

show, either to sell it or put it into a company at a good figure. I hope you will be able to make a good sale. Should any purchaser come out here to purchase, of course I would do nothing until I heard from you. This much I would say, however, that before going into a company you might telegraph to me how you propose going in, and should I decline, would telegraph you immediately on receipt of your dispatch, or should you have any other private arrangements on hand, and my presence should be needed, I might come on. I leave that all to you. I am perfectly willing to take $10 per acre, should you make a sale. Good deal of excitement still existing all over the State. Hoping soon to hear from you either by telegraph or letter, Yours very truly,

"SAM'L LOGAN."

(Stamp, S. R. D., June 7, '65.)

"Collector's office, 3d District, W. Va.

"June 7th, 1865.

"Being satisfied that the instrument herewith annexed was not stamped at the time of issuing it through any intention to defraud the United States revenue, but that the omission was through mere inadvertence, I have, therefore, this day, caused the proper stamp to be affixed and canceled.

S. R. DAWSON,
COLLECTOR INT. REV.
3D DISTRICT, W. VA.

"S. R. DAWSON,
"Coll'r 3d Dist., West Va."

The telegram of the complainant in response to this, is as follows:

"PALMYRA, Oct. 18, 1864.

"(By telegraph from Parkersburg, Va., October 18, 1864.)

"To SAMUEL L. LOGAN.

"*Sir:*—I will take your Trunk creek and Goose creek land at your offer, ten (10) dollars per acre, and have sent my negotiated note to you on seventy-five (75) and one hundred (100) days, for the amount, and will send draft for five hundred (500) dollars, to be credited on the first note. Send me the deeds immediately, reserving lien till paid. Answer immediately as I have to go away. I will write in full.

"WM. DILS."

There were three other letters of the complainant filed with the answer, written respectively on the 7th, 10th and 14th of October, all urging the defendant to close the matter, as "oil men" could not wait, to execute papers and deeds, as the "oil fever" might go down. The last, written October 14th, contains this expression: "If you want to sell it to me, as I proposed, send on the deeds as soon as possible; if not, send the power authorizing me to make the deed, and I will sell it for you and make you grease me well for it."

Hon. GEORGE H. LOOMIS, Judge of the Circuit Court of Wood County, presided on the hearing of the cause.

J. M. JACKSON and D. LAMB, for the appellant.

LEE and HUTCHINSON, for the appellee.

BROWN, President.

I have failed to find, in the facts of this cause, proof to satisfy my mind of the existence of the relation of principal and agent, or any relation of trust and confidence other than kinship between the appellant and appellee, relative to the land in question, at the date of the letter of September 27, 1864, by the appellee, Dils, to the appellant, Logan.

In the letter of Dils to Samuel Logan, of September 27, 1864, and Logan's reply thereto, of October 7, 1864, and Dils' response by telegraph, of October 18, 1864, and the receipt and retention by Logan of the notes for the price asked by him, which were sent him by Dils, with the other evidence in the cause, I think it is clearly manifest what the parties understood and intended. One had land and the other had facilities for selling it at a speculative price. One said, in brief, fix your price, and I will sell your land if I can, at that price, and as much more as I can get, taking the chances for my compensation in the excess above the limits you thus prescribe. The other, in effect, said in reponse, I will take ten dollars per acre, and you can sell it at your own cost at that price, and as much more as you can get, finding, however, your sole compensation for services and costs in the excess you may

be fortunate enough to obtain, and on receipt of the price, I will convey, with general warranty, to the extent of the amount received by me.

It was not in the contemplation of the parties that Dils should become the agent, in the ordinary sense of the term, of Logan, and bound as such to disclose the knowledge he might acquire, or be controlled by the principal in the mode of effecting the contemplated sale. But it is very manifest that it was their intention and understanding to make what is popularly called "an optional contract," in which the party giving and the party receiving the option, stand to each other in the double relation of seller and buyer, and principal and agent. In the latter relation, the party receiving the option and acting strictly within the prescribed authority, may make sale of the land and bind the principal to execute the contract; and in the former relation he is not bound to make known either his information or the mode of his proceeding. The price being fixed, as respects the vendor, he has no interest beyond that in the subject-matter. His interest in having the sale effected being secured by being allied with the interest of the party receiving the option, whose only remuneration and indemnity is in the excess of price to be obtained by his efforts

Taking them together, Dils' letter of September 27th and Logan's reply to it, and the sale made by virtue of it, and the receipt of the prescribed price of ten dollars per acre by Samuel Logan from the purchaser, the result, in my opinion, was a complete contract by which Dils became entitled to the excess, as the product, no less than the reward of his own efforts.

The bill and answer together set forth the said letters and sale, and the prayer is for specific execution and the payment of the said excess of price, and for general relief. It is true, the bill draws another conclusion from the same facts, and charges it to be a sale, direct or absolute, from the defendant Logan to the complainant Dils, for ten dollars per acre, and a successive sale by him to the ultimate purchaser, William A. Logan, for twenty dollars per acre. And I am free to confess that I think this view of the case justified by the subsequent conduct of Samuel Logan, who may be taken to have acquiesced in and assented to the modified acceptance of his offer,

as stated in complainant's telegram of October 18, 1864, by retaining and refusing to deliver up the notes of complainant for the stipulated price of ten dollars per acre, and also by his refusal to make the conveyance with general warranty for the whole amount of the purchase money, which he should have done on his own pretension that Dils acted merely as his agent in making the sale at twenty dollars per acre.

I think, therefore, that in either aspect of the case the circuit court erred in refusing to the complainant the full relief prayed for; but this error is not insisted on by the appellee, and the appellant has no right to complain of it, as it is an error in his favor and not against him.

The bill of review, which was rejected, was based on the assumption that there was no such contract as stated, and that therefore the prayer for specific execution and for general relief would not warrant the relief granted of compensation for services rendered as agent merely.

But in the view above taken of the contract resulting from the facts stated in the pleading, I think it was not only competent to the court to grant the relief it did, but the entire relief also, as claimed by the complainant, and to which he was entitled in either aspect of the case.

It is also objected that the contract was not stamped, and was therefore void. A satisfactory answer to the objection is, that it was stamped by the United States Collector of Internal Revenue, and his certificate thereof indorsed on the letter of October 7, 1864, which relieves from the necessity of considering the question of validity for want of a stamp.

This view of the case, in effect, disposes of all the objections taken by the appellant to the decree of the court below; and the error as against the appellee being waived, the decree should therefore be affirmed, with costs and damages to the appellee.

MAXWELL and BERKSHIRE, JJ., without concurring in all the reasons of the President, concurred in the conclusion that the decree should be allowed to stand.

Decree affirmed.

CORBETT, Adm'r, v. BERRYHILL.

(29 Iowa, 157. Supreme Court, 1870.)

Situation of contracting parties. In construing a contract and for the purpose of getting at the intention of the parties, their situation and all the circumstances surrounding the transaction may be considered.

[1] **Warranty not implied, on sale of mining claim—Title lost by vendee failing to represent.** A contract for the sale and conveyance of an interest in certain mining claims in Montana, after stating the terms of sale and describing the property, stipulated that upon the payment of certain notes given as part of the purchase price, the vendor would make "a good and sufficient deed." The title to the claims was afterward lost by a failure to do the work required by the miners' rules in the region where the claims were situate: *Held*, it appearing that the parties only intended the sale and conveyance of a mere possessory right, that the covenant to convey contained in the contract did not amount to a warranty of title; that the vendor thereunder was only bound to execute a deed for the interest he possessed at the time of the contract; that he was not bound to protect and keep alive his interest in the claim by having the same worked in accordance with the miners' rules; and that the loss of title, by reason of the failure of the vendees and others interested to keep it alive, constituted no defense to an action on the notes given for the purchase money.

A "claim" personalty—Sale of administrator. A "miner's claim," being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator.

Appeal from Johnson District Court.

Action in chancery. Decree for plaintiff in accordance with the prayer of the petition. Defendant appeals. The facts of the case are fully set out in the opinion. The same case was before this court upon questions other than those now determined. See 27 Iowa, 534.

RUSH CLARK, for the appellants.

EDMONDS & RANSOM, for the appellee.

BECK, J.

On the first day of July, 1866, Isaac L. Allen, by his

[1] *Blake* v. *Thorne*, 16 Pac. 270.

attorney in fact, R. D. Stephens, executed a contract to sell and convey to defendants, Berryhill and Downey, his interest in certain mining property or claims in the territory of Montana. The following recitations are in the contract, viz.: That Allen "has this day agreed to sell to (the parties above named), all the interest in the property hereinafter described, which was conveyed to the said Allen by Charles H. Berryhill, as trustee, by deed dated 26th day of January, 1866, and recorded on pages 159 and 160, book 5, records of Jefferson county, Montana territory. And whereas the said Downey and Berryhill have agreed to purchase the same, and pay therefor the sum of $4,500 to the said Allen, and have made, executed and delivered to him their two certain promissory notes for the purchase money, both dated July 1, 1866, both payable in one year from date to said Isaac Allen, or order, at the First National Bank of Marion, Iowa, both drawing interest at the rate of ten per cent. per annum, from date, until paid, one being for $2,500 and the other for $2,000; and the said Allen, by his attorney aforesaid, has agreed to make, execute and deliver to said Downey and Berryhill, a deed to said property, on the payment of said notes. Said property is described as follows: an undivided eighth part of the following property, to wit: Then a particular description of the property is given, which consists of claims on certain mining *lodes;* the numbers and description of the claims are set out, and mention is made of certain incumbrances upon them, after which the contract closes with the following stipulation: "Now, therefore, the said Allen, agrees to and with the said Downey and Berryhill, to make them a good and sufficient deed, as aforesaid, on the payment of said notes."

The action is brought to enforce the payment of the notes executed by Berryhill and Downey under this contract, and the plaintiff prays for a decree granting him proper power and authority to convey the property described in the contract in accordance with its provisions. Prior to the commencement of the action Downey died. His administrator and widow are made defendants; they do not join in the appeal. Allen, at the commencement of the suit, was under guardianship, on account of insanity; he has since deceased, and his administrator was substituted in place of his guardian as plaintiff.

His widow is joined as a defendant. The defenses made upon this appeal have proper foundation in the answers of defendant Berryhill, which need not be further referred to. Certain questions as to the validity of the contract, raised by defendant on a former appeal in this court, are not now presented, having been there finally disposed of. See 27 Iowa, 534.

The evidence, it may be admitted, so far as the questions we are about to determine are concerned, establishes that the right and title to the property held by Allen at the date of the contract has been lost since that time, and the property was abandoned by those holding it in August, 1867. In this view of the case appellant insists that the true construction of the contract requires the plaintiff to show "good title" in the representatives of Allen to the "one eighth" of the property; that nothing less than the conveyance of such an interest, "with marketable title," will satisfy the covenants of the contract, and that, as, by the terms of the contract, it is *in futuro* and executory, the plaintiff must show the interest, which was conveyed to him by Berryhill as a trustee, was kept good by Allen and his representatives. This is the main defense to the action.

In forming a conclusion as to the true interpretation of the contract we must aim at the intention of the parties, which will be followed unless violence is thereby done to the rules of language or the rules of law. The construction adopted should accord with the terms of the contract as understood and adopted by the parties: *Conwell* v. *Pumphrey*, 9 Ind. 135.

The intention of the parties may be ascertained by evidence of extrinsic circumstances which surround the transaction, the court thereby placing itself in the situation of the contracting parties whose language it is called upon to construe. The circumstances and situation of the parties thus become a medium through which their intentions may be discovered: *McCraney* v. *Griffin*, 13 Iowa, 313; *Karmuller* v. *Krotz*, 18 Id. 352; *Hasbrook* v. *Paddock*, 1 Barb. 635; *Brown* v. *Slater*, 16 Conn. 192; *Fowle* v. *Bigelow*, 10 Mass. 379; *Sumner* v. *Williams*, 8 Id. 214.

The objects which the parties had in view in inducing the

contract are also to be considered in its construction: *Strong* v. *Gregory*, 19 Ala. 146.

As the actions of men are usually the index of their intentions, it is obvious that their acts may be proved, in connection with their contracts, in order to arrive at their true intention in regard to the obligations they assume and accept from others.

The peculiar facts and circumstances of the transaction involved in the case before us we will briefly consider. Certain parties, then in Montana, made discovery of and located the mining claims described in the contract of Allen. A company was formed, consisting of the discoverers and Berryhill, Downey, Allen and others, for the purpose of working the mines. The three parties named above, whose transaction is the subject of this suit, were never in Montana, and had no personal knowledge of the property. It was conveyed to Berryhill by the parties making the discovery or holding the title thereto, as a trustee, for the purpose of conveying to those who were or might become interested therein as members of the company. Allen became the owner of one eighth part of the property, and a deed therefor was executed to him by Berryhill, in January, 1866. He paid for the interest conveyed to him $4,000, and afterward paid to the company, or some one acting for it, $500, which was used in expenses attendant upon the enterprise. It was the intention of the associates to work and develop the mines, and it was thought by all concerned that the investment would pay largely. The claims were held by them under the rules adopted by the miners of the territory, but no title from the United States was acquired. This seems to have been well understood by all concerned. The company were making arrangements to work the mines, but no great amount of money appears to have been expended for that purpose prior to the date of Allen's contract. Shortly prior to that time Allen, who was in failing health and whose mind was seriously impaired, was induced by his friends to dispose of his interest in the property. He probably set on foot some negotiations with Berryhill and Downey looking to that end, but, his mental disorder increasing, he induced Stevens to accept a power of attorney, authorizing him to attend to this and other business. Thereupon Stevens opened a cor-

respondence with them for the purpose of inducing them to buy the interest of Allen in the mining claims. At this time the title of the property was not doubted, and it was still believed to be a profitable investment. The reasons given for offering the property for sale were Allen's bad health and mental infirmities. The sum asked was the amount paid for the property by Allen. The offer was finally accepted, payment to be made in one year, with interest at ten per cent. per annum. The sale was consummated by the execution of the contract by Allen, and the execution of the notes by Berryhill and Downey.

After this some expenditures were made by the company in the improvement and development of the mines, but finally, in August, 1867, they were abandoned on account of the want of means on the part of the company, and of the further fact that they proved unprofitable. No effort seems to have been made to acquire the title to the lands, whereon the mines are situated, from the United States, and it does not appear whether, under the rules of the mines, the company kept their claims good. It is, of course, understood that all the operations in regard to the mines were conducted by the associated owners as a company. We have no evidence that the claims to the mines were impaired until after their abandonment of the property in August, 1867. All who were engaged in the enterprise expected to realize profits from the property by working the mines, or by selling interest therein. It was not esteemed valuable for any other purpose. It will be remarked that the interests of the different owners were held in common, and no division of the property was actually made or contemplated.

These facts and circumstances being considered in connection with the contract, under the rules of interpretation above stated, it appears that it was not the intention of Allen to sell, nor the other parties to buy, under the contract, the fee simple title to the lands. The possessory or miners' claim was the subject of sale alone. The contract of Allen, while it did not convey the legal title of the property, undoubtedly invested Berryhill and Downey with the equitable title thereof; it, in fact, seems to have been a device for the sale of the property, retaining the title in the grantor, as security for the purchase

money. Can it be doubted that under this contract the purchasers were interest-invested with full right to the enjoyment of the interest purchased? In case the enterprise had proved profitable after the execution of the contract, and large sums of money had been realized as the share of profits due to the interest conveyed by Allen, can it be pretended that he would have been entitled to receive them? We think no court of law or equity would so hold. Unquestionably, the right of Berryhill and Downey, after their purchase, to the full enjoyment of the interest purchased, was complete. That being so, Allen could not be charged with the duty of improving, developing and working the property for the purpose of protecting it. If it was lost before final abandonment, we infer from the evidence it was from the neglect of that duty on the part of those who had the care of the property, the miners' rules and the law applicable thereto requiring the claims to be made good in that way.

We are clearly of the opinion, in view of all the circumstances, that Allen's contract is for the conveyance of the interest he held at the time of the execution, and did not impose an obligation upon him to protect and make good the title he conveyed. If the title failed, not from any fault on his part, it is, therefore, no defense in an action upon the notes.

The Allen interest, being undivided, would be protected and the title preserved by the same acts of possession and care that would preserve the interests of the other tenants in common, and the acts that would preserve it would protect the other interests. Now it can hardly be supposed that the contract imposed upon Allen the burden of making expenditures to preserve the property of the other members of the company, Berryhill and Downey included. If Berryhill and Downey found that their interests were so worthless that they would not be reimbursed in making necessary expenditures to keep them, and they finally found it was necessary to abandon them, can they hold Allen responsible for an omission to do that which they found would be ruinous to them? It would require the useless expenditure of money by Allen to preserve that which they admit was valueless.

Whatever view we take of the contract in the light of the circumstances and situation of the parties reveals to us no

other interpretation consistent with its term and the evident intentions of the parties than that plaintiff is bound to convey the title and interest held by Allen, when the contract was made, without being liable for a failure thereof from any of the causes set up in the defense.

The language of the contract will scarcely admit of any other interpretation. Allen undertook to convey the interest in the property which was conveyed to him by a certain deed. There is no express stipulation that he will warrant the title he thus acquired. His consent to convey by good and sufficient deed must be construed to require such a deed for the interest he thus undertakes to convey. On this point see *McNear* v. *McComber*, 18 Iowa, 12; *Shreck* v. *Pierce*, 3 Id. 350.

The appellant insists that the heirs of Allen are necessary parties to this suit, and, as they are not joined, the court can not authorize the plaintiff to convey the property described in the contract, and that, unless the conveyance be made as therein provided, recovery can not be had on the notes.

As we have seen, the property described in the contract is a mere possessory right or "claim" upon public lands. Such claims are held to be personalty, and may be sold and conveyed by the administrator: *Bowers* v. *Keesecker*, 14 Iowa, 301; *Stewart* v. *Chadwick*, 8 Id. 463. The heirs are, therefore, not necessary parties.

Affirmed.

PHILLIPS v. HOMFRAY.

FOTHERGILL v. PHILLIPS.

(L. R., 6 Ch. App. 770. Court of Appeals in Chancery, 1871.)

Specific performance—Secret mining before purchase. The owners of a colliery entered into a contract with an adjoining land owner for the purchase of his estate without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it: *Held*, that the court would not enforce the contract at the suit of the purchasers, though the sale was not shown to be at an under-value.

[1] **Mining and carriage across boundary—Measure of damages—Wayleave allowed.** The owners of a colliery worked across their line and extracted coal from adjoining lands and carried coal, to some extent from mines of their own, through the workings under the land trespassed on. Upon bill for an account: *Held*, that the owner was entitled to the value of the coals gotten under his land, with an allowance for raising but none for getting, and to compensation in the way of wayleave and royalty for all minerals gotten by the defendants from their own land and carried under plaintiff's land.

Laches by co-tenant in objecting to sale. A and B. being tenants in common, A, without any authority from B, contracted for the sale of the estate. B, on being informed of it, objected, and said the price was too low; but a mortgagee threatening to sell the estate under his power unless this sale proceeded, B allowed the matter to go on, and gave no notice to the purchaser that he dissented; an abstract was delivered and negotiations as to the title went on for about three years. *Semble*, that it was too late for B to object that the agreement was entered into without his authority.

Natural percolation from upper to lower mine. The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint against the owner of the other mine. The owner of the upper mine has a right to work it as he likes, and his neighbor below can not complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement.

This was an appeal by Rowland Fothergill, one of the several persons carrying on business in partnership under the style of the Tredegar Iron Company, from a decree of Vice-Chancellor Stuart

Joseph Phillips and John Phillips were the owners of a farm of 116 acres copyhold of the manor of Abercarne, in Monmouthshire. Their predecessor in title has sold to the Tredegar Iron Company fourteen acres, formerly part of the farm, reserving the minerals. It appeared that, according to the custom of this manor, the minerals belonged to the copyholders, subject to certain rights in the lord. The farm was subject to a mortgage for £4,800. In 1859, the Tredegar Iron Company, whose mineral property surrounded the farm, negotiated, through their then manager, R. P. Davis, with the Messrs. Phillips for a lease of the coal under the farm to the company at 6*s.* per ton royalty, the minimum rent being £250. The company, upon the commencement of these negotiations, drove headings under the farm from an adjoining colliery for

[1] *Coal Creek Co.* v. *Moses*, 15 M. R. —

the purpose of testing the coal. About October, 1860, the company refused to take a lease, but, without the knowledge of the owners, went on working under the farm, and extracted from it a considerable quantity of coal. In January, 1863, the farm was put up for sale by auction, but it was bought in. On the 14th of April, 1863, an agreement for sale to the company of the farm and of the minerals under the fourteen acres, (subject to the rights of the lord of the manor) for £5,000 was signed by James Reed, the manager of the company, and by Joseph Phillips, who was treated by the agreement as sole vendor. At the time when this agreement was entered into the coal taken by the company from under the farm amounted to upward of 2,000 tons, and it was not known to either of the Messrs. Phillips that any coal had been got, except the trifling quantity which had been got in the process of testing. The agreement for sale was entered into by Joseph Phillips without the authority of John Phillips, who, when informed of it, objected, and said that the price was too low; but the solicitors of the mortgagee informed him that if he refused to carry the sale into effect the mortgagee would sell under his power. John Phillips, therefore, did not inform the company that he repudiated the sale, but allowed the matter to proceed, though it did not appear that he in any way actively concurred. An abstract was delivered, and considerable difficulties were found in the title, which caused great delay. In July, 1866, the Messrs. Phillips received information which led them to believe that the company had been working under the farm. They thereupon applied for leave to inspect the underground workings, which was refused. They shortly afterward instructed two persons, who, on the 16th of May, 1866, succeeded in surreptitiously getting into the mine, and discovered that the workings had been going on. Joseph and John Phillips accordingly, in September, 1866, filed their bill (*Phillips* v. *Homfray*) for an account of all coal and ironstone gotten by the company under the farm; for an account of all coal and ironstone conveyed from the company's mines through passages under the farm, and of coal and ironstone gotten out of mines of the company which had been drained or ventilated through roads, passages, aircourses, or watercourses under the farm; and that the company might be decreed to pay for the coal and ironstone gotten from under the farm at their values

when first severed from the mine, and to pay for all underground way-leave and privileges which they had used under the farm in getting coal and ironstone from their own mines; and that they might be charged with a way-leave rent or royalty in respect of their user of the aircourses, watercourses and roads under the farm; and be restrained by injunction from using any aircourse, watercourse or road under the farm. The bill also prayed for an injunction to restrain further working, and for liberty of access to the mines. As regards the agreement for purchase, the original bill simply stated that there had been a negotiation for purchase by the defendants but that no binding agreement had been come to. The defendants, by their answer, set up the agreement for purchase as a binding agreement, upon which the bill was amended by stating more fully the circumstances of the agreement, the non-concurrence of John Phillips, and circumstances on which the plaintiffs relied as showing that the company had abandoned the purchase some time before the bill was filed.

On the 9th of February, 1867, the company filed their bill (*Fothergill* v. *Phillips*) for specific performance of the agreement. The Messrs. Phillips, in their answer, alleged that the agreement was invalid for want of the concurrence of John Phillips, and because it was entered into in ignorance of the company having got a large quantity of coal under the farm, and because it was a sale at an under-value, and entered into in consequence of false representations made by the agent of the company as to the value of the mines. The lord chancellor was not satisfied that the under-value was proved or that false representations had been made, and these two points need not be further noticed.

The evidence as to the state of the underground workings was not complete and satisfactory, but it led to the conclusion that the company had carried coal to some extent from mines of their own through underground workings under the farm, and that water from the company's mines had run into the mines under the farm; but there was nothing to show that any steps had been taken for the purpose of draining the company's mines through the mines under the farm—the flow of water, so far as appeared, being only the natural flow from an upper mine to a lower when the barrier is broken through.

It further appeared that air shafts not reaching to the surface had been made under the farm from one bed to another; but it did not appear that they had been made with any other object than that of ventilating the works carried on for the purpose of getting coal under the farm. That a considerable quantity of coal had been got under the farm at the date of the agreement was admitted.

The cause came on to be heard before Vice-Chancellor Stuart, and his honor made a decree in both suits, dismissing the bill in *Fothergill* v. *Phillips* with costs, declaring the agreement for sale not binding on the Messrs. Phillips, and ordering it to be delivered up to be canceled. Then, after a declaration of the liabilities of the several members of the company and the representatives of deceased members, the following inquiries were directed in respect of the matters to be inquired after: 1. An inquiry what quantities of coal, ironstone and other produce had been gotten or removed by the partners, or any of them, or by any other person or persons by their or any of their order, etc., from or under the Messrs. Phillips' farm; and it was ordered that the market price or value, or as near thereto as might be, of all such coal, etc., at the pit's mouth—all just allowances being made to the defendants in the first suit in respect of their charges and expenses (if any) on account of the carriage to the pit's mouth of such coal, etc., but no allowance being made for the expenses of getting, severing or working the same—should be certified. 2. An inquiry what quantities of coal, ironstone, and other produce had been conveyed from the collieries and mines of the defendants in the first suit, or any of them, over or through the roads or passages under the plaintiffs' farm. And also what quantities of coal, ironstone and other produce had been wrought and gotten out of the collieries and mines of the defendants in the first suit, which had been drained or ventilated through the watercourses, roads, passages or aircourses under the plaintiffs' said farm. 3. An inquiry what amount, upon the result of the inquiry last directed, ought to be paid by the defendants in the first suit to the plaintiffs in the first suit, for way-leave and royalty in respect of the user by the defendants in the first suit of the said watercourses, roads, passages and aircourses, for the purpose of working or ventilating their

said collieries and mines. 4. An inquiry whether the said farm and the mineral property of the plaintiffs in the first suit under the same had sustained any, and (if any) what amount of damage by reason of the manner in which the defendants in the first suit had worked the coal, etc., under the plaintiffs' farm, or by reason of the improper working of the defendants' mines in respect of the letting in of water from the defendants' mines or otherwise. A perpetual injunction was granted to restrain the defendants in the first suit from working under the farm, and from using any watercourse, road, passage or aircourse under it; and an order was made for giving the plaintiffs in the first suit access for the purpose of the inquiries. An injunction was granted to restrain, until the completion of the inquiries, the stopping up of passages affording access to the mines under the farm. Liberty of access was also given to the plaintiffs in the first suit for the purpose of stopping up all passages into their mines, and directions were given for ascertaining the expenses of so doing. The costs of the first suit up to the hearing were given to the plaintiffs, and further consideration was adjourned.

Rowland Fothergill appealed from this decree.

Mr. DICKINSON, Q. C., and Mr. HOMERSHAM COX, for the appellant.

The evidence shows that there was not any misrepresentation on the part of the petitioners, and that the price agreed to be given was the full value.

(The LORD CHANCELLOR.—Your difficulty is, that you suppress the fact of your having worked the coal. It is like killing a man's horse and then making an offer to buy it, leaving him to suppose that it is still alive.)

We submit it is rather like buying a box of gold from which the purchaser, unknown to the vendor, has abstracted some pieces. The vendor puts his price upon it on the footing that all the gold is there, so he can not be damnified. The agreement then, we submit, was good, and John Phillips must by his conduct be taken to have ratified it. But, supposing the court against us on the main point, the decree is too severe. The cases show that the mode of taking the account is different, as the minerals have been taken innocently or fraudulently:

Powell v. *Aiken*, 4 K. & J. 343; *Morgan* v. *Powell*, 3 Q. B. 278; *Martin* v. *Porter*, 5 M. & W. 351; *Hilton* v. *Woods*, L. R. 4 Eq. 432. Here the milder form of account ought to have been directed, for the company worked under a *bona fide* belief that they were purchasers.

Mr. GREEN, for the respondents in the same interest.

Mr. GREEN, Q. C., Mr. FRY, Q. C., and Mr. HIGGINS, for the Messrs. Phillips, were not called upon as to the main substance of the decree, but only on the question whether the inquiries as to minerals gotten out of the company's mines, which had been drained or ventilated through the mines of the Messrs. Phillips, should be retained.

LORD HATHERLEY, L. C.

As regards the main question in dispute, I consider that the decree is perfectly right. The case is, no doubt, an important one, but it is one in which the defendants in the first suit have managed to place themselves most completely in the wrong, and it would be impossible, under the circumstances, for this court to decree specific performance of the agreement.

I must confess that I was considerably impressed with Mr. Dickinson's argument, that it was too late for John Phillips to say that he was not bound by the contract, after having lain by so long without expressing any dissent, though perfectly aware from the first of his brother having entered into it professedly on his behalf. In the view I take of the case it is unnecessary to decide this point, and I have not heard the respondents upon it; but, as at present advised, I am of opinion that it was the duty of John Phillips, if he dissented, to express his dissent as soon as he was informed of what his brother had done, and that if there had been nothing more in the case he must have been taken to have ratified the agreement.

With regard to the question of under-value, I have not heard the argument of the respondents, but I am not impressed by the evidence that the sale was at an under-value, for the property is a farm surrounded by other mineral property of the company, and not of sufficient extent to be advantageously worked as a separate colliery. Moreover, there is evidence of the existence of faults in the property; but, in my opinion, it

is unnecessary to decide the question of under-value. Mr. Dickinson made considerable impression upon me while commenting upon the judgment of the vice-chancellor; but, although his honor's words might seem at first sight to indicate a wider range, it seems to me, on consideration, that his judgment is really founded upon that on which I found mine, viz., that the gentlemen who are now seeking specific performance of the contract were, at the time when it was entered into, aware of important facts not known to the appellants, and which ought to have been disclosed to them. This court requires the utmost good faith between buyer and seller, and will not specifically enforce a contract which is not entirely according to good faith. In the present case the state of circumstances is not merely that the company knew something with regard to the value of the coal which was not known to the vendors, but that the company knew this fact, of which I must take it on the evidence the vendors were entirely ignorant, viz., that the company had helped themselves to a large portion of the property. If a man knows that he has committed a trespass of a very serious character upon his neighbor's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case, and to say to him: "I regret that from mistake" (if it be mistake, and I will assume it to be so for the present purpose), "I have taken some two thousand tons of your coal. I do not know what your view of the case may be; I am ready to buy the property out and out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal which I have taken." The proposal which he makes is not, in reality, a simple proposal for purchase of the property; it involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware. He is, therefore, bound to inform the owner of the circumstances of the case, and is not at liberty to enter into a contract without disclosing his commission of an act which has rendered him liable to certain consequences, and of which act the person with whom he is dealing has a right to be informed, in order to know what course he is to

adopt. The observations of the vice-chancellor, as to the purchaser's knowing more of the value than the vendors did, would, if I may venture to say so, have been erroneous if made without reference to the special circumstances of the case. I apprehend it would be an error to say, generally, that you can not enforce a contract in this court, where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good. But I apprehend that the vice-chancellor meant his observations to be understood with reference to the circumstances of the particular case, and that when he says the vendors did not know the subject-matter of the contract, he means that they did not know that coal had been taken to the extent of 2,000 tons, and that in that state of circumstances they could not be held to the bargain. If, indeed, under-value were shown, this observation would naturally suggest itself; the case is not merely that the purchasers, being more experienced men, knew the value of the coal better than the vendors, but that the vendors, being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it in order to test its value, and did not communicate to the vendors the result. I apprehend that in such a case the court, whatever it might do as to canceling the contract, certainly would decline to enforce it. The case would, I think, be something analogous to this: Suppose a picture dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and thus finds a mark showing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist. I do not, however, dwell on that point, as it is not satisfactorily established, in my mind, that the price was inadequate. The ground of my decision is, that the appellants suppressed the fact of their having wrongfully got a large quantity of the respondents' coal, and so given the respondents a heavy pecuniary claim against them. Mr. Cox contended that this was no prejudice to the vendors, for that

they bargained for the sale of the whole concern, so that this coal was paid for. This argument is not sound; for, according to the principle of *Martin* v. *Porter*, 5 M. & W. 351, the vendors are entitled to be paid for the coal wrongfully severed, a sum much greater than its value while ungotten; and I do not think it possible for a person in any case secretly to substract from his neighbor's property, and then to bind him by an agreement for the sale of the property without communicating to him the fact of the encroachment. I think that the company have only themselves to blame for the position in which they are placed, and that the decree as a whole is correct.

I, at first, felt some doubt as to compensation for way-leave, but on further consideration I think that on principle it ought to be given, whether the cases have as yet gone that length or not. Here is a man doing a surreptitious act, which can not be discovered except through the medium of a bill. Under the old practice there would have been a bill for discovery of the thing, and then an action for damages in respect of it would have been brought; but this court has now the power to grant compensation in respect of a continuously accruing damage *de die in diem*, arising from a continuous trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through the respondents' property. These damages can not be better assessed than by an inquiry what is fit and proper to be paid for way-leave for the coals carried through the property. I therefore affirm that part of the decree.

I think, however, that there is not enough alleged on the pleadings, or proved, to establish the title of the respondents to compensation for the improper working of the appellants' mines. Then as to the account which has been directed of what quantities of coal have been brought out of the appellants' mines, which have been drained or ventilated by means of the mines of the respondents: this opens an inquiry enormously expensive in itself, and subject to the gravest objection. It would be a question, among other things, as to what particular portion of the company's mine would be affected. Then, moreover, there is no allegation in the pleadings as to the drainage, properly so called, of one mine through the other. The drainage for which miners pay is the carrying away the water from their own mine in a drift or channel

into another drift or channel in their neighbor's mine, carrying it by an artificial channel. The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint as against the owner of the other mine. The owner of the upper mine has a right to work it just as he likes, and his neighbor below can not complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement. Then as to ventilation, the air shafts which have been made for the purpose of getting the respondents' coal must be of some value for the ventilating some parts of the company's mine; but it is not probable that they can be of much value for that purpose, and I do not find anything in the evidence to show that they were made for any other purpose than that of ventilating the works which the company were carrying on for the purpose of improperly getting the respondents' coal. Upon the whole, therefore, I do not think that I ought to direct this extensive and vexatious inquiry, which is likely to be productive of no useful result to any of the parties litigant.

The decree must, therefore, be varied by striking out the declarations as to the right of the respondents to compensation for any improper working of the company's own mines, and in respect of drainage or ventilation, and the corresponding inquiries; but these slight alterations do not affect the costs of the appeal, which must be paid by the appellant.

MARSH v. HOLLEY.

(42 Connecticut, 453. Supreme Court of Errors, 1875.)

The right of the other co-tenants to dig ore and deposit the rock on the surface is not an incumbrance, such as to prevent any co-tenant giving perfect title.

[1] **The vendee is not bound to take an imperfect title;** he can not be driven to assume risks and rely on the covenants in the deed for his remedy.

Deed by co-tenant of severed interest. A co-tenant may sell his fractional

[1] *Mawson* v. *Fletcher*, 14 M. R. 657; *Stevens* v. *Guppy*, 13 M. R. 315.

interest in parcel of the tract in which he owns in common, where his co-tenants assent to the giving of such conveyance.

[1] **Time to perfect title.** The vendor is entitled to a reasonable opportunity to make a good title.

Consideration money not paid. A vendee can not recover upon a covenant to convey, where he has never paid or tendered the consideration money.

Release by vendee. The vendee who has placed his bond on record so as, to that extent, to cloud the vendor's title, can not treat the contract as rescinded and recover a partial payment without first tendering a release thereof.

Debt, upon a bond for the conveyance of real estate, with a count for money had and received, brought to the Superior Court in Tolland County. The defendant pleaded the general issue, with notice of the condition of the bond set out in the declaration, and of his readiness and willingness to perform the same, but that the plaintiff had wholly neglected to perform, or to tender performance, on his part. The issue was closed to the court and the following facts found:

The defendant, on the 23d day of September, 1869, executed and delivered to the plaintiff a bond in the penal sum of twenty-five thousand dollars, to which was annexed the following condition:

"The condition of this obligation is such, that whereas the said Marsh has purchased of me, and I have sold to the said Marsh, his heirs and assigns, forever, upon the conditions following, three undivided seventh parts of all the iron ore in, upon and beneath all those certain tracts or parcels of land known as the Porter Farm, so-called, situate in the village of Lakeville, in the town of Salisbury; which farm is the same, all the same and none but the same land which was heretofore conveyed by William P. Burrall and Harriet H., his wife, Moses Lyman, Jr., and Mary Ann, his wife, and S. S. Robbins and Sally P., his wife, to Elisha Lee, then of said Salisbury, by their deeds dated the second day of April, A. D. 1839, and recorded in said Salisbury town records, to which said deeds reference is herein had for a more particular description of said premises; together with the rights and privileges of entering, at any and all times, with laborers, cattle, horses, mules, teams, carts and other vehicles, and of searching for, digging and raising said ore, and transporting said ore upon

[1] *Macbryde* v. *Weeks*, 13 M. R. 346.

and from said premises, together with any and all royalties, rents or incomes now due, or which may hereafter become due, under and by virtue of a certain lease heretofore executed by Alexander H. Holley, Samuel S. Robbins, Sally P. Robbins, Mary A. Holley, trustee, Moses Lyman, Mary Ann H. Lyman, William P. Burrall and Harriet H. Burrall, to Henry B. Graves, James Hubbard and H. Tudor Brownell, by instrument dated April 20, A. D. 1868, and jointly acknowledged April 27 and July 15, 1868, and which is hereby referred to. It being understood and agreed that said purchase and sale are made subject to said lease; and it being also further agreed that in case said lease should become forfeited or void, then the said Marsh is to have and exercise all my rights and interests which said lease purports to convey, so long as said Marsh shall continue to pay, according to their terms, his several notes given me this day, as hereinafter described. And whereas the said Marsh has this day paid me, in cash, toward the payment of the purchase made by him as aforesaid, the sum of $2,500, and has given me his note of August 31, 1869, for $2,500, payable September 10, 1870, to the order of himself and indorsed by himself, and also by Woodruff and Beach; and has also given me his three other notes, all dated September 10, 1869, each for the sum of $5,166.67, and respectively payable to me with interest, annually, on the 10th day of September, in the respective years 1870, 1871, 1872: Now, if I shall, by a good and sufficient deed or deeds, with the usual covenants of seizin and warranty, convey to said Marsh, his heirs and assigns, the interest purchased by him as aforesaid, upon payment of said note of $5,166.67, due September 10, 1870, and upon tender of a good and sufficient mortgage of the interest so purchased or other satisfactory security by said Marsh to secure said two notes maturing, respectively, September 10, 1871 and 1872, then this instrument is to be void; otherwise to be and remain in full force and virtue in the law. It being understood and agreed that nothing herein is to be so construed as to make me, the said Holley, or my estate liable to any person or persons for any damage to land or any interest therein in consequence of anything done in obtaining or removing said ore."

The plaintiff paid the defendant the sum of $2,500 in cash,

and gave him a note for the same amount, indorsed by Woodruff and Beach, which was received as cash, but the same was not paid at maturity, and was never paid in full. The other notes have never been paid. The time for paying the $5,000 note was extended from time to time until November 10, 1870, but the note was not paid, nor was the amount tendered or offered to the defendant, and the defendant has never delivered to the plaintiff a deed of the premises.

The "Porter Farm," referred to in the bond, was a part only of the real estate of John M. Holley, deceased, the father of the defendant, and lay adjoining to another large tract of land belonging to the estate.

The distribution of John M. Holley's estate contained the following clause: "It is understood and agreed by the children of the said John M. Holley, deceased, that all the iron ores which may be found in the land hereinafter distributed shall be owned by them in common, in equal seventh parts, and we have accordingly distributed to each an equal undivided seventh part of any ores that may be found upon any of the following described real estate, which has been distributed to said widow and children, with the privilege of ingress and egress to each and all of them, for the purpose of digging said ores. It is also understood that if any damage is done to the land distributed to any heirs in searching for, digging or transporting said ores, reasonable damage shall be paid to the owners of said land."

The distribution contained no other provision for paying damages thus done to mineral rights.

The mineral right distributed extended into all the lands owned by John M. Holley at the time of his decease. At the time the bond was executed the defendant was the owner of three sevenths of the ore right.

The reason given by the plaintiff, at the time, for refusing to take a deed pursuant to the agreement, and pay the sum of $5,000, was that the other heirs of John M. Holley owning the adjoining lands or the mineral rights in them, could dig in those other lands, and place the earth and debris upon the land in which the mineral right was to be conveyed by the defendant to the plaintiff. If such an incumbrance existed at the time the bond was executed, it continued to exist, and did exist on the 10th day of November, 1870.

The plaintiff now claimed that a further disability, or reason why the defendant could not convey a good title, existed at the time the bond was executed, and still existed, namely, that the ore rights of the Holley heirs, so reserved by the distribution, extended over all the land of John M. Holley, deceased, of which the land in question, together with other adjoining lands, formed a part, and that the defendant had no legal right to convey an undivided mineral right in the lands described in the bond.

When the defendant was informed of this objection he arranged, verbally, with the other Holley heirs to unite with him in the conveyance provided for in the bond, or in some other manner to ratify and confirm the same; and at the time of the trial claimed to be able and willing to make a good conveyance of the mineral right whenever the plaintiff should fulfill the bond on his part.

Both parties supposed, when the bond was given, that the defendant had, and could convey, a good title to the property therein described.

The land described in the bond upon which the three sevenths ore right was to be conveyed was distributed to the three daughters of John M. Holley.

The several conveyances of the land, or of parts thereof, since the distribution, and of parts of the ore right, appear more fully in the report of the case of *Hartford Ore Co.* v. *Miller*, 41 Conn. 112. It was agreed that the facts found in that case should be considered as found in this.

Upon these facts the case was reserved for the advice of this court.

PERKINS and MARCY, for the plaintiff.

A. P. HYDE, for the defendant.

CARPENTER, J.

The plaintiff seeks to recover, either on the count in covenant for a breach of the covenants contained in the bond, or on the counts in assumpsit for the money paid by the plaintiff under the contract.

The defendant's covenant is a conditional one, and the condition imposes a duty upon the plaintiff, the performance of which, or a legal excuse for non-performance, is essential to his right of recovery. The finding is explicit that he neither performed or offered to perform his part of the contract. But he insists that he is excused from performance, and that the defendant is liable for not performing his covenants.

This excuse is two-fold: 1. That the co-tenants of the defendant in the mineral right in the real estate of John M. Holley, deceased, have a right to dig for ores in any part of the estate and place the earth and debris on the Porter farm (in which is the right or interest contended for by the plaintiff) and that this right constitutes an incumbrance upon the premises which prevents the defendant from conveying a good title, which incumbrance, he insists, not only excuses the performance of the conditions on his own part, but is itself a breach, or equivalent to a breach, of the defendant's covenants.

We do not think this a correct view of the law. All the iron ores in the land belonging to the estate of John M. Holley were separated from the land, and a new estate created, in which each of the heirs had an undivided seventh part. The distribution provides that certain damage done to the land of any of the distributees in digging for ores, etc., shall be paid; but there is no provision for paying damage to a co-tenant in the ore estate. The interest of each tenant in that estate is such, and such only, as the law gives. The right to dig for ores, and of necessity to deposit the earth and debris somewhere, inheres in the estate itself. The damage done to land owned by an individual, who may or who may not be interested in the ore, shall be paid; but the damage done by the co-tenants to each other is an inconvenience inseparable from the nature of the estate, and to which each must submit. It is a legal incident like that which pertains to all joint tenants or tenants in common of an estate. As such it is no more an incumbrance than the right of eminent domain, or the right to levy and collect taxes, which exist with regard to all estates.

2. The plaintiff claims, in the next place, that the defendant, being an owner of an undivided interest in the ore estate, which estate exists in all the land belonging to the estate of

John M. Holley, can not sell his interest in a part only of the land without the concurrence of his co-tenants.

We think it must be conceded that the defendant was able to give just such a deed as he agreed to give, and just such a deed as the plaintiff agreed to receive. The condition of the estate, and of the defendant's title thereto, was apparent upon the record. Presumptively, therefore, whatever infirmity there is in such a deed was as well known to the plaintiff then as now. At least the difficulty of conveying such a title as he contracted for was apparent. We assume, however, that the plaintiff was not bound to advance his money and receive therefor a deed which conveyed only an imperfect or defective title. It would certainly seem to be a reasonable construction of the contract to hold that the parties contemplated that the plaintiff should receive a perfect title; and therefore that he should not be required to receive a defective one, and take the risk of being evicted, and, if evicted, to be compelled to resort to his remedy upon the covenants in the deed.

On the other hand, the defendant claims that when he was first informed of this objection (which was not until after the time limited in the bond for paying the money and taking a deed had expired) he arranged verbally with the other heirs to unite with him in the conveyance provided for in the bond, or in some other manner to ratify and confirm the same, and further claimed that at the time of the trial he was able and willing to make a good conveyance of said mineral right whenever the plaintiff should fulfill the bond on his part. It was certainly possible for the defendant to have given a good title in the manner indicated: *Hartford Ore Co.* v. *Miller*, 41 Conn. 112. If the plaintiff at the time had given this reason for not paying the money, we think it is quite clear that the difficulty might have been removed. We are unable to see why the defendant was not entitled to a reasonable opportunity to make a good title. He was not bound to do so until the money was paid or tendered, conditioned upon receiving a good title. When paid, or thus tendered, the plaintiff might then have demanded a perfect title. It is not enough to say that this objection was not known until afterward. His knowledge, or want of knowledge, of the difficulty of giving a good title could not destroy or impair the defendant's rights.

We conclude, therefore, that it was the plaintiff's duty to pay, or at least to be ready and willing to pay, the money according to the condition in the bond. His failure to do so is a fatal objection to his right to recover for a breach of the covenants. In other words, the legal difficulty of conveying a good title is not *per se* a breach of the defendant's covenants.

The plaintiff further claims that he is entitled to recover upon the money counts.

The grounds of this claim are that the defendant, being unable to convey by reason of the insufficiency of his title, or by reason of an incumbrance upon the premises, the plaintiff may treat the contract as rescinded; that "both parties supposed, when the bond was given, that the defendant had and could convey a good title to the property therein described," and therefore the consideration was paid and received under a mutual mistake; and lastly, that the defendant, by his act of joining in the deed of August 11, 1873, to Miller, will be deemed to have rescinded his contract, inasmuch as he thereby parted with a right which left his own title different from the title which he agreed to convey to the plaintiff.

We have no occasion to examine these several reasons for the purpose of determining whether this claim is well founded, for there is one fact in the case, which, in its present aspect, effectually bars the plaintiff's right to claim that the contract has been abandoned or rescinded. By a reference to the record in the case of the *Hartford Co.* v. *Miller*, which record is made a part of this case, it will appear that the plaintiff, on the 17th day of October, 1870, caused the bond now in suit to be recorded in the Salisbury records, and at the time the report of the committee in that case was made (December 18, 1873) still insisted on an equity right in the premises. It nowhere appears that the plaintiff has ever abandoned that right or claim; nor does it appear that whatever right in equity he acquired in the premises by recording his bond, has ever been transferred or tendered to the defendant. On the contrary, it remains upon record a declaration to the whole world that he claims under it as an existing and outstanding contract, and operates as a cloud upon the defendant's title. Whatever rights, therefore, the plaintiff may have in respect to the consideration paid under this contract, he is not now in a condition to enforce those rights,

and will not be until he has done, at least, all in his power to place the defendant *in statu quo.*

We therefore advise the Superior Court to render judgment for the defendant.

In this opinion the other judges concurred.

MELTON ET AL. v. LAMBARD.

(51 California, 258. Supreme Court 1876.)

[1] **Mining claim is real estate—Statute of Frauds.** A gold mine is real estate and an interest therein other than an estate at will or a lease not exceeding one year, must be created by operation of law or by an instrument in writing. A verbal sale will not pass title.

Possession of single tenant in common. The owner of an undivided interest in a mining claim is entitled to the exclusive possession as against plaintiffs showing no title in themselves.

Appeal from the District Court, Eleventh Judicial District, County of El Dorado.

Ejectment to recover three fourths undivided of a gold-bearing quartz mine, called the Earle Mine, in Mount Pleasant Mining District, county of El Dorado. The evidence showed that one Earle located the mine about the 6th day of June, 1874, and that in August he made a verbal sale to the plaintiffs of an undivided one half of the mine, and to one Loughborrow a verbal sale of an undivided one fourth, and that Loughborrow afterward conveyed by instrument in writing to the plaintiffs. The plaintiffs and Loughborrow paid a valuable consideration and went into possession with Earle. Earle afterward left and the defendant went into possession and excluded the plaintiffs. The defendant owned one undivided one fourth of the mine. When these facts appeared on the trial, the defendant moved for a non-suit, which was granted by the court. The plaintiff appealed.

A. P. CATLIN and GEORGE G. BLANCHARD, for the appellants.

[1] *Harris* v. *Equator Co.*, 12 M. R. 178.

G. J. CARPENTER and GEO. E. WILLIAMS, for the respondent.

BY THE COURT.

The plaintiffs claim title to an undivided interest in the Earle Mine, through a verbal sale made by Earle. A mine is real estate, and an interest therein, other than an estate at will, or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing: Civil Code, Sec. 1091.

The defendant was the owner of an undivided interest in the mining claim, and as such was entitled to the exclusive possession thereof, as against the plaintiffs—they not having shown any title in themselves.

Judgment affirmed.

HAMILL v. THOMPSON ET AL.

(3 Colorado, 518. Supreme Court, 1877.)

[1] **Rescission—Refusal by vendee to pay.** When the payment of the purchase money is a condition precedent to the delivery of the deed, the refusal to pay the whole or any balance due leaves the vendor at liberty to rescind the contract.

Return of purchase money. Where the vendor receives part of the purchase money he must, before seeking relief in equity against the vendee, return or offer to return the amount received, with interest.

[2] **Remedy for breach of contract of purchase.** Where A held title to realty in trust for B, and at B's request conveyed to C. the payment of the purchase money being a condition precedent to the delivery of the deed, and the deed, having been delivered without compliance with that condition: *Held*, that on refusal of payment B had his election either to pursue his remedy at law against C, and thus affirm the contract, or to rescind the contract and seek equitable relief.

Discretion in decreeing rescission. Whether the rescission of a contract will be decreed rests in the sound discretion of the court, exercised with reference to all the equities of the case.

Non-assent to delivery. A mere demand for the payment of the balance of purchase money can not be regarded as an acquiescence in the wrongful delivery of an escrow, and as depriving the vendor of his right to rescind.

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[1] *Getty* v. *Devlin*, 7 M. R. 29; 13 M. R., note 4.

[2] *Byard* v. *Holmes*, 6 M. R. 598.

[1] **A deed delivered in violation of the conditions of an escrow** can have no force or effect as a deed.

Scope of prayer for general relief. If a complainant mistake the relief to which he is entitled, the court may, under the prayer for general relief, adjust its decree to the full equity of the case.

Parties. Those only who have an interest in the *object* of a suit in equity are ordinarily required to be made parties.

Appeal from District Court of Boulder County.

The case is stated in the opinion.

JAMES M. NORTH, for appellant.

GEORGE D. REYNOLDS and ORRIS BLAKE, for appellees.

ELBERT, J.

The bill in this case alleges that on the 25th day of July, 1875, the appellant, who was the complainant below, purchased of Davis a one fourth interest in the Keystone Mine; that at the date of the purchase the mine was owned in common by the said Davis and one Clark; that Davis did not convey the said one fourth interest to the appellant, but by agreement held the same in trust for him; that on the 25th day of August, 1875, appellant sold said fourth interest to the defendant, Henry C. Thompson, for the sum of one thousand dollars, payable five hundred dollars within twenty days, and five hundred dollars within a reasonable time thereafter; that on the same day, at the request of appellant, Davis made a deed of the said one fourth interest to Thompson; that by agreement of parties the deed was placed in the hands of one Andrew P. Thompson as an escrow, upon the condition that it was not to be delivered until the one thousand dollars was paid as above stipulated; that the defendant, Henry C. Thompson, paid a portion of the purchase money, amounting in all to eight hundred dollars; that on the 27th day of September, 1875, Andrew P. Thompson, without the consent of appellant, delivered the deed to Henry C. Thompson contrary to, and in violation of the conditions of the escrow; that upon the same day Henry C. Thompson filed the deed for record;

[1] *Soderberg* v. *Crockett*, 17 Nev. 409; *McCann* v. *Atherton*, 106 Ill. 31; *Bostwick* v. *McEvoy*, 62 Cal. 496.

that at the time of delivery, as aforesaid, there remained due and unpaid, of the purchase money, two hundred dollars; that Henry C. Thompson refused to pay the same; that thereupon the appellant rescinded the contract of sale, and gave Thompson, the purchaser, notice thereof; that on the 9th day of December, 1875, and prior to filing his bill, appellant tendered him the amount of the purchase money paid by him to appellant, with interest, which Thompson refused to accept; that he also demanded from Thompson a conveyance of said one fourth interest in the mine, which he refused to make; that Andrew P. Thompson and one William H. Taylor, about the time of said sale, acquired by purchase an undivided one half interest in the mine, and in connection with the said Clark and Henry C. Thompson had possession, occupied and worked the mine since the 25th day of August, 1875, and had taken out large quantities of ore of the value of sixty thousand dollars, and that the said Henry C. Thompson had received and converted to his own use the one fourth part thereof.

The bill prays that the deed to Henry C. Thompson so placed in escrow, be declared null and void, or that he be adjudged to hold said one fourth interest in trust for appellant, and decreed to convey the same to appellant; that he also be decreed to account for one fourth of the proceeds of the ore taken out during his occupancy of the mine, and that he be enjoined from taking ore from the mine, or in any way intermeddling with the same pending the litigation; also, that the other owners of interests in the mine, Clark, Taylor and Andrew P. Thompson, be enjoined from permitting Henry C. Thompson from interfering with the mine, and that they be enjoined from delivering to him, or accounting to him, for any share of the ore taken out of the mine during the pendency of the suit.

To this bill the defendants interposed a demurrer upon the grounds: 1st, want of equity in the bill; 2d, non-joinder of proper parties, in that Simon Davis was not made a party to the bill; 3d, misjoinder of parties in that Andrew P. Thompson, William H. Taylor and Henry H. Clark were made parties to the bill; 4th, that the bill is multifarious. The demurrer was sustained and the bill dismissed.

The bill alleges, and the demurrer admits, that Davis held the title to a one fourth interest in the Keystone Mine in trust for the appellant, and at his request conveyed the same to Thompson, to whom appellant had sold. By the terms of the sale to Thompson, the payment of the purchase money was a condition precedent to the delivery of the deed, and upon his refusal to pay the whole or any balance due, the appellant was at liberty to rescind the contract: *Burnett* v. *Caldwell*, 9 Wall. 290; *Jackson* v. *Moncrief*, 5 Wend. 26; 2 Chitty's Contracts, 1090 (11th Am. Ed.); 2 Parsons on Contracts, *679. (6th Ed.)

The bill alleges the default of Thompson in making payment, and notice to him of rescission by the appellant. He who seeks equity must do equity, and the appellant having received payment of part of the purchase money before seeking relief in a court of equity, it was necessary for him to return, or offer to return, the amount received with interest: Story's Eq. Jur., § 64 (*e*); *Latham* v. *Hickey*, 21 La. Ann. 425; *Lee* v. *Taylor*, Id. 514.

The bill alleges an offer by the appellant to return the amount of the purchase money received, with interest, and the refusal by Thompson to receive it. Had the conveyance placed in escrow been a deed direct from the appellant to the purchaser, Thompson, upon the rescission of the contract, the appellant might have maintained ejectment: *Burnett* v. *Caldwell*, 9 Wall. 290; *Jackson* v. *Moncrief*, 5 Wend. 26; *Wright* v. *Moore*, 21 Id. 230.

The conveyance being from Davis, who held the title in trust for appellant, direct to the purchaser, Thompson, the appellant properly sought relief in a court of equity. That the appellant had an action at law on his contract does not oust a court of equity of its jurisdiction. On refusal of payment he had an election either to pursue his remedy at law, and thus affirm the contract, or to rescind the contract and seek the equitable relief to which the facts entitled him. Whether the rescission of a contract will be decreed rests within the sound discretion of the court, exercised with reference to all the equities of the case; "not an arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself,

so far as may be, by general rules and principles." 1 Story's Eq. Jur. 693, 742.

A chief consideration is always whether the parties can be placed in *statu quo*. Upon the facts stated, it can not be said that any difficulty of this character forbids the decree of rescission. We find nothing in the bill to support the proposition that the appellant waived his right to rescind the contract in question. His right to rescind sprang from the refusal of Thompson to pay a portion of the purchase money then due, and not from the wrongful delivery of the escrow. The bill alleges that after the refusal of Thompson, the purchaser, to pay, the appellant rescinded the contract and gave him notice thereof. What time intervened between the refusal to pay and the rescission does not appear; and if a question whether the rescission was made within a reasonable time could arise in such a case it was not fairly presented by the demurrer.

Acquiescence in the wrongful delivery of the escrow, if shown, might lose the appellant the right to rescind, and leave him to his action at law for the balance of the purchase money, the same as if the deed had been delivered at the time of the purchase; but no facts appear in the bill upon which acquiescence can be predicated. "Nothing short of an express satisfaction of the deed, or such an acquiescence after a knowledge of the facts as would raise the presumption of an express ratification would give the deed validity." *Hadlock* v. *Hadlock*, 22 Ill. 388.

The demand for the payment of the balance of the purchase money could not be so regarded unless the purchase money had been paid. As the deed to Thompson was placed in escrow, and was delivered by the depositary in violation of the conditions of the escrow, it had no force or effect as a deed: 3 Washburn on Real Prop. 586 (4th Ed.); 1 Parsons on Contracts (6th Ed.), 493. The court of equity may either direct its cancellation or may treat the vendee as a trustee and decree a conveyance to the complainant: 1 Story's Eq. Jur., § 437; *Bussell* v. *Stinson*, 3 Hay, 1; *Dey* v. *Dunham*, 2 Johns. Ch. 182.

The jurisdiction of courts of equity in cases of this character, their power to order the delivery up and cancellation of

deeds and other instruments fraudulently or otherwise improperly obtained, to direct a conveyance of title where equity and good conscience demand it, to decree an account of rents and profits if such are involved, are too well understood and too fully treated of in the text-books to need discussion: 1 Story's Eq. Jur., § 692 *et seq.*; Kerr on Fraud and Mistake, 332 *et seq.*

Nor is it necessary to inquire into the propriety of the specific relief prayed in the bill. If a complainant mistake the relief to which he is entitled under the prayer for general relief, the court may adjust its decree to the full equity of the case: Story's Eq. Pl., §§ 40, 41, 42. The objection to the bill for want of equity was not well taken.

The next objection presented by the demurrer is that Davis, who held originally the title in trust for the appellant and who executed the deed to Thompson, was not made a party to the bill. The general rule in equity, as laid down by Mr. Story, is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or defendants, that there shall be a complete decree that shall bind them all. Ordinarily this is held to include those only who are interested in the object of the suit: Story's Eq. Pl., § 72.

How is Davis interested in this suit? The bill alleges and the demurrer admits his character as trustee, and the full and complete discharge of his trust by the conveyance to Thompson at the instance of the appellant, for whose benefit he held the title. Having fully discharged himself of the trust, the appellant has no further claim upon him respecting it. If the appellant would have the right upon the cancellation of the deed to Thompson, to demand a reconveyance to himself upon the ground that the first execution of trust had been ineffectual, it obviously would not accrue until the cancellation was decreed, and to have sought such a re-execution of the trust in this bill would have made it clearly multifarious, as joining two distinct claims to relief against different parties not mutually interested. Story's Eq. Pl., § 541. The appellant prayed no relief against him, nor can we see that the interest of the defendants required that he should be made a party. The relation in which he stood to the subject-matter of the suit is

admitted by both parties, and he has no interest in the *object* of the suit. No decree that can be rendered between the parties can affect him, for he has no interest in the property to be affected. To claim that he may be interested in the property in some other way or character than that stated in the bill, is to retract the admissions of the demurrer. Clark, Taylor and Andrew P. Thompson, as part owners of the mine, and as working it in connection with the defendant, Henry C. Thompson, are made parties defendant to the bill, and an injunction is asked restraining them from accounting to him for any portion of the proceeds of the mine. This is the only relief asked against them. In this view they are proper parties, and the bill was not multifarious by reason of their joinder.

The demurrer was improperly sustained, and the decree of the court below is reversed with costs, and the cause remanded for further proceedings.

Reversed.

INDEX.

ABANDONMENT.

1. *Abandonment of tailings.*—To suffer the tailings to flow where they list without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary. *Jones* v. *Jackson*, 72

ABATEMENT—See NUISANCE, 1.

ACCESSION.

1. *Reclaiming personal property after annexation.*—The right of the owner of personal property to reclaim it, if he can identify it, does not exist when the property has been annexed to another person's freehold and becomes a part of the realty. *Jackson* v. *Walton*, 488

See REAL ESTATE, 1; TROVER, 4; TAILINGS, 4, 11.

ACCOUNT.

1. *Rental value treated as proper measure of damages on suit for account.*—In an action by tenants in common of an undivided interest against their co-tenants who had claimed the whole under conveyances inoperative as against the complainants, it appeared that defendants had worked the land for gold. It was proved that the uniform usage was for lessees to allow to the proprietors one fourth of the gold found, clear of all charge of expense, and this was adopted as the measure of accounting. *Held*, a proper decree, and preferable to taking a strict account of the profits and expenses. *Allen* v. *Barkley*, 246

2. *Action of account at law.*—The statute providing that whenever a suit shall be instituted against two or more defendants to compel them to an account, it shall be by bill in equity, has reference to where defendants are sued to answer severally and not as joint bailiffs or partners who have a common defense. *Barnum* v. *Landon*, 250

3. *Declaration need not charge taking excess.*—A declaration charging the defendants as joint bailiffs of the plaintiffs of iron ore taken from a bed occupied by both parties as tenants in common: *Held*, sufficient, without charging that defendants had taken more than their share of the ore. *Id.*

4. *Liability of lessees.*—Whether the lessor or the lessee of a fractional interest is the party to be held to an account depends upon the question as to which of them was in possession receiving the rents and

ACCOUNT. *Continued.*

profits; the payment of rent by the lessee to the lessor of the fractional interest, is no defense to the action for an accounting. *Id.*

5. *Mortgagee, not a necessary party.*—A mortgagee who has not completed his foreclosure so far as to obtain possession, is not a co-tenant and not a necessary party to an action for an account. *Id.*

6. *Gold dust treated as money—Interest.*—Clean gold taken from washings may be treated as money, and interest allowed on it where wrongfully kept by co-tenant, as upon so much money received. *Huff* v. *McDonald*, 263

7. *Action between tenants in common for account.*—One tenant in common may maintain a suit in equity against his co-tenant who has occupied the whole of the common property for an account of rents and profits. *Early* v. *Friend*, 271

8. *Rental value, the measure of accounting.*—Where the common property (salt works) is rented out by one tenant in common he is accountable to his co-tenants for their share of the rents he has received, and where he occupies and uses the whole property himself he is liable for a reasonable rent for it in the condition it was in when he took possession. *Id.*

9. *Act enlarging equity jurisdiction, unconstitutional.*—The act of April 22, 1856, giving a tenant in common in coal or iron mines, whose right is denied or resisted, the power to apply by petition in equity to the court of common pleas to adjudicate and determine the rights of the several parties according to the course of a court of chancery, conflicts with the constitutional right of the citizen to have controverted questions of fact in common law causes decided by a jury. *North Penna. Coal Co.* v. *Snowden*, 294

10. *Accounting between co-tenants of mines.*—In the case of a tenancy in common in lead mines, an account of issues and profits is the proper mode of adjustment. And in settling the accounts of the operating tenants, they should not be charged a sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing the lead; but each so operating is to be charged with all receipts and credited with all his expenses on account of the operation of the mine. *Graham* v. *Pierce*, 308

11. *Allowance for improvements.*—The operating tenant should have a credit for necessary improvements made by him. *Id.*

12. *Practice as to further accounting* stated where a remnant of the business remains undisposed of. *Id.*

13. *No account in favor of ousted co-tenant till title settled.*—A court of equity has no jurisdiction of a bill for an account of profits brought by one out of possession, who claims to be joint owner in an oil well, against his alleged co-tenants, until the question of title is first determined in a court of law. *Frisbee's Appeal*, 344

14. *Account against trustee renouncing trust.*—Account decreed against a trustee who, having engaged the trust property in an adventure, afterward renounced it for the trust, and declared it to be on his own account, though no part of the trust money had been actually laid out. *Wilkinson* v. *Stafford*, 522

ACCOUNT. *Continued.*

15. *Slave injured in mine returned by purchaser.*—A part of the property sold in violation of the trust, being slaves, were used in the mines, and one of them was injured and was thereupon returned to the *cestuis que trust.* On a decree against the purchaser for the price at which he purchased the slaves, he should be credited for those returned at their value when returned. *Barksdale* v. *Finney,* 541

16. *Demand—Periods of accounting.*—Account will not ordinarily lie until after demand, and then only at reasonable periods. An annual accounting is usual and reasonable. *Barnum* v. *Landon,* 250

See MEASURE OF DAMAGES 1, 9; TENANTS IN COMMON, 10- 12, 14, 19; TRUSTS.

ADVERSE CLAIM—See TRESPASS, 3.

ADVERSE POSSESSION—See TROVER, 1.

AGENT.

1. *Consent to sell at a certain time at a certain price.*—When the intended sale falls through it does not operate as a continuing power to sell at any time, especially where the property is mining land and fluctuating in value; and new authority is required after any considerable interval even though the price obtained may be larger than that before provided for. *Palmer* v. *Williams,* 560

2. *Ratification of unauthorized sale—Estoppel.*—An unauthorized sale of land can not be ratified, except in writing or by such conduct as creates an estoppel; and such ratification must be by a party informed of the facts. And there can be no estoppel, unless a party is misled to his prejudice by the one against whom it is set up and does material acts relying upon conduct well calculated to mislead him. *Id.*

See TRUSTS, 21, 29.

AGRICULTURAL CLAIM.

1. *Conflicting appropriation of ranchman and miner.*—One who claims public lands in this State for raising fruit trees or crops, can not enjoin miners from digging up the same for mining purposes, unless he can show that his fruit trees were planted or crops sown before the land was located for mining. *Ensminger* v. *McIntire,* 440

See TIMBER, 3, 5.

ALTERATIONS AND ERASURES.

1. *Unauthorized alteration in assessment roll.*—The assessor has no authority to make any alteration after the roll has passed out of his hands; and where such an alteration was made to correct a mistake: *Held,* that the roll in its original state was the proper assessment roll; that as it remained legible, as originally made, the unauthorized alteration did not avoid it; and that it was competent evidence on the alteration being accounted for. *Nevada* v. *Manhattan Co.,* 149

2. *Effect of alterations and erasures.*—No one can be deprived of the benefit of any instrument on account of an alteration or erasure, provided it appear that such erasure or alteration was made without the knowledge or consent of the party wishing to use the same, and it can be ascertained by any legal method how the instrument originally read. *Id.*

ANNUAL LABOR—See WARRANTY, 1.

APPEAL.

1. *Weight of evidence not important on appeal in case of conflict.*—Though the Supreme Court may consider a judgment of a district court against the weight of evidence, it will not disturb it on that ground, if there is a substantial conflict of evidence. *Brewster* v. *Sime*, 573

APPROPRIATION.

1. *Extent of title of appropriator.*—A prior appropriation of the public domain establishes a *quasi* private proprietorship, which entitles the owner to be protected in its quiet enjoyment against all the world but the true owner, except in the case of agricultural and grazing lands, as against the privileges granted to miners. *Tarter* v. *Spring Creek Co.*, 371

See AGRICULTURAL CLAIM, 1; TIMBER.

APPURTENANCES.

1. *Right of way appurtenant.*—A right of way cannot be used by the owner of the dominant tenement to land other than that to which it is appurtenant. *Coleman's Appeal*, 222

ASSIGNMENT—See TRUSTS, 24.

ASSUMPSIT.

1. *Indebitatus assumpsit* will not lie by a person claiming title against one who enters on land as a trespasser, to recover the issues and profits received by him. *Irvine* v. *Hanlin*, 241

See TENANTS IN COMMON, 6.

BILLS AND NOTES—See TRUST, 29.

BONA FIDE PURCHASER.

1. *Payment before notice—Payment after notice.*—No one is protected as a *bona fide* purchaser who has not made payment before notice. It is not enough that he purchases without notice, if he pays after notice. *Palmer* v. *Williams*, 580

BOUNDARIES—See LOCATION, 1.

BROKER—See TROVER, 9.

BULLION—See TAX, 51.

CERTIORARI.

1. *Certiorari to commissioners.*—If a person against whom an assessment is made make an affidavit before the commissioners of appeal to what he believes to be the true value, and the commissioners refuse to make a corresponding reduction, relief can be obtained in this court by *certiorari*. *State* v. *Randolph Township*, 103

CLAIM.

1. *A "claim" personalty—Sale of administrator.*—A "miner's claim" being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator. *Corbett* v. *Berryhill*, 671

See APPROPRIATION, 1; TAX, 8, 15, 33, 49, 50.

COMMON LAW.

1. *The common law adapts itself to the circumstances* and necessities of the community where it is introduced. *Hale & Norcross Co.* v. *Storey County*, 115

CONFUSION—See TAILINGS, 3.

CONSIDERATION—See RESCISSION, 1; VENDOR AND PURCHASER, 15.

CONSTITUTIONAL LAW—See JURY, 1; MUNICIPAL CORPORATIONS, 1; TAX, 44.

CONTRACT—See TIME, 1.

CONVERSION.

1. *Confined to excuses alleged at time of conversion.*—When the refusal of a corporation to issue a certificate is placed upon a certain ground or excuse which is not valid they can not be heard to allege other reasons on trial not before urged. *Bond* v. *Mount Hope Co.*, 500

See STOCK, 4; TROVER.

CONVEYANCE.

1. "*Mining ground*"—*Technical meaning of the words.*—The words "mining ground" when used in a deed, have a technical meaning. They refer to that interest which a mere occupant of the mine has in the same. They are not the words used when a fee simple or leasehold interest in real estate is to be conveyed. *Hale & Norcross Co.* v. *Storey Co.*, 115

2. *Bill of sale of mining claim.*—A bill of sale, not under seal, is insufficient to convey a mining claim. *McCarron* v. *O'Connell*, 429

3. *Recitals in deed not binding upon strangers.*—A recital in a deed that the parties making it are the heirs at law of the former owner, binds only the parties making the deed and persons claiming under it, but is no evidence against strangers. *Yahoola River M. Co.* v. *Irby*, 460

See DELIVERY, 1; ESCROW, 1; STATUTE OF FRAUDS, 3; TENANTS IN COMMON, 17, 25; TRUSTS, 2.

CORNWALL ORE BANKS—See TENANTS IN COMMON, 1.

CORPORATIONS.

1. *Net earnings defined.*—The net earnings of a company on which tax is to be assessed under the act of April 30, 1864, are the product of the business, deducting the expenses only. *Commonwealth* v. *Penn Co.*, 163

2. *New company succeeding to liabilities.*—H., who controlled all the stock of the B. corporation, contracted with third persons to obtain a charter for another corporation of which they were to be the corporators, and to transfer to the new corporation all the stock, and convey all the real estate and other property (except slaves) of B., as also some real estate of his own. The charter was obtained and the stock transferred; no conveyance of the real estate was made, but the new corporation took possession of it and claimed it as its own: *Held*, that the new corporation is the successor of B., and takes the property subject to payments of the debts of the corporation of B., to the value of the property received. *Barksdale* v. *Finney*, 541

CORPORATIONS. *Continued.*

3. *Collateral attack upon corporate organization.*—If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or special laws, the question is one of law, and it is for the State alone to take steps to dissolve such corporation or forbid the exercise by it of corporate rights and franchises. *Doyle* v. *Peerless Pet. Co.*, 569

4. *Courts of equity* do not take cognizance of such questions in respect to corporations. *Id.*

See NOVATION, 1; STOCK; TRESPASS, 17.

COSTS.

1. *Costs disallowed to both parties* on account of piling up a mass of testimony resulting in failure to prove the respective allegations on account of which it was called. *Clegg* v. *Clegg*, 289

CUSTOM—See SURFACE SUPPORT, 1, 4; TAILINGS, 7; TIN STREAMING, 1; USAGE.

DEFAULT.

1. *Default—Reliance upon third parties.*—It is no excuse, in a motion to set aside a default, that the defendant had relied upon the promises of others. *Kuhn* v. *McAllister*, 512

See DILIGENCE, 1.

DELIVERY.

1. *Non-assent to delivery.*—A mere demand for the payment of the balance of purchase money can not be regarded as an acquiescence in the wrongful delivery of an escrow, and as depriving the vendor of his right to rescind. *Hamill* v. *Thompson*, 696

DEMAND—See CONVERSION, 1.

DESCENT—See TRUSTS, 1.

DEVISE—See TENANTS FOR LIFE, 7.

DILIGENCE.

1. *Want of diligence in making motion.*—When the demurrer of defendant was overruled more than six months before he moved to be allowed to answer: *Held*, want of diligence and a motion to be denied. *Kuhn* v. *McAllister*, 512

See LAND OFFICE, 1.

DISCLAIMER.

1. *A disclaimer* affects only the question of costs. *Bronson* v. *Lane*, 248

2. *The defendants had a right to file of record, during the trial, a disclaimer* of all right to the land described in the writ, except as to the privilege of taking out chrome. *Harris* v. *Tyson*, 635

DISCOVERY.

1. *Right to veins intersected in tunnel dependent on discovery.*—The right to possession of lodes granted by section four of the act of Con-

DISCOVERY. *Continued.*

gress of May 10, 1872, to tunnel owners, is dependent, among other things, upon *discovery* of the lode in the tunnel. The effect of section two of the act is to give a party running a tunnel for any purpose, whether for prospecting or development, the right to locate any lode not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface. *Corning Tunnel Co.* v. *Pell*, 612

DRAINAGE.

1. *Mine carrying water from surface into another mine.*—The owner of a coal mine in working it removed the ribs of coal which supported the roof, by reason whereof the surface sank and surface water flowed into the mine and thence into the mine of an adjoining owner. *Held*, that the former was liable to the latter for the damage, though he had worked according to the usage of miners and without negligence. *Horner* v. *Watson*.

See FLOODING, 1.

DURESS.

1. *Compromise with a man in jail*, though not at the suit of the party with whom it is made, disfavored, and on the facts in this case, disallowed. *Wilkinson* v. *Stafford*, 522

2. *Duress, to invalidate a deed*, must be of the person. A threat to sue the grantor for a good cause of action will not invalidate it. *Harris* v. *Tyson*, 635

EJECTMENT.

1. *Effect of sheriff's return in Pennsylvania practice as proof of ouster.*—In ejectment the sheriff returned the writ as "served" upon the defendants and the latter pleaded "not guilty," but at the trial proved that what they possessed they rightfully possessed under the grant, and as to the residue disproved possession. *Held*, that the *prima facies* of the sheriff's return was thus rebutted; that the plaintiff's claim was for the whole, and defendants had a right to a general verdict. *Bronson* v. *Lane*, 349

2. *Title outstanding in a trustee* will prevent a recovery by the beneficiaries. *Hugunin* v. *McCunniff*, 463

3. *Conveyance executed after action brought* will not strengthen the title of plaintiff in trespass. *Id.*

See TRESPASS, 3.

EQUITY.

1. *Where a party would be liable in case of loss*, by parity of reasoning, he should be entitled to the gain in case of working to a profit. *Johnson* v. *Lamping*, 450

See ACCOUNT, 9; STATUTE OF LIMITATIONS, 3, 4.

ESCROW.

1. *A deed delivered in violation of the conditions of an escrow* can have no force or effect as a deed. *Hamill* v. *Thompson*, 697

See DELIVERY, 1.

ESTOPPEL—See AGENT, 2; TROVER, 2.

EVIDENCE.

1. *An offer to prove "conversations,"* without showing, with the offer, their relevancy, may be refused, without error. *Harris* v. *Tyson*, 635

2. *Letter, as evidence.*—A witness having testified that he had received a letter from defendant, the contents of which he communicated verbally to the plaintiff, it was not error to permit the letter to be read to the jury—it being evidence of the defendant's fair dealing in relation to the contract sought to be set aside, and relevant to the point in controversy. *Id.*

See FRAUD, 2, 3.

EXECUTION.

1. *Collecting execution by working a gold mine.*—The fact that a judgment debtor is found upon the mining ground of plaintiff is no justification to an officer holding an execution against such debtor in going upon such land and digging and taking the gold to satisfy the writ. *Rowe* v. *Bradley*, 431

See SHERIFF'S SALE, 1; TRESPASS, 9.

EXECUTORS AND ADMINISTRATORS.

1. *Administrator's deed.*—In showing title by an administrator's deed, the power to sell must be proved. *Yahoola River Co.* v. *Irby*, 461

See CLAIM, 1; TRUSTS, 22.

FLOODING.

1. *Natural percolation from upper to lower mine.*—The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint against the owner of the other mine. The owner of the upper mine has a right to work it as he likes, and his neighbor below can not complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement. *Phillips* v. *Homfray*, 678

See DRAINAGE, 1; SURFACE SUPPORT, 9; TIN STREAMING, 1.

FRAUD.

1. *Civil imprisonment for fraud.*—A judgment of imprisonment will not be sustained upon a general averment that defendants "are guilty of fraud." The facts upon which the charge of fraud is based must be specifically alleged in the complaint. *Payne* v. *Elliott*, 515

2. *Public declarations before purchase, as evidence of fraud.*—An offer on the part of the plaintiff, in an action for the rescission of a conveyance, to prove that the defendant, having knowledge of the nature and value of sand chrome, of which a large body existed on the plaintiff's land, concealed that knowledge, and actively put in circulation a report that *sand chrome* was of no value, and thus impressed the public mind with that idea, for the purpose of enabling him to make extensive purchases of lands containing sand chrome, and that in consequence of an erroneous impression thus created, the defendant was enabled to buy most of the chrome lands in the neighborhood, including the plaintiff's tract, was properly rejected, no offer being made to show that the

FRAUD. *Continued.*

declarations of the defendant proposed to be proved were made to the plaintiff or in his presence, or were communicated to him. *Harris* v. *Tyson*, 65

3. *Evidence that the plaintiff was a poor man*, was properly rejected, *Id.*

4. *General statement no proof of specific fraud.*—A declaration by defendant that it was his intention "to monopolize the chrome business," is not evidence in an action brought to set aside a conveyance of a chrome right in the land of the plaintiff. *Id.*

See SPECIFIC PERFORMANCE, 1, 2; STATUTE OF FRAUDS, 1; TRUSTS, 7. 15; VENDOR AND PURCHASER, 4-6.

GARNISHMENT.

1. *Working claim pending redemption.*—Upon execution sale against a mining company defendant bought in its claims. After sale he made an agreement with the company by which the company was to work the claims during the period allowed for redemption, and pay the proceeds, less outlays, to defendant, he, the defendant, standing all expenses, pay or no pay. Under this arrangement he received $7,000. Afterward the judgment was reversed, *pro tanto*, and reduced to a sum less than such sum of $7,000. *Held:* (1) That if the sale was void and the entry of defendant a trespass, the proceeds of a tort were not subject to garnishment. (2) That under the contract no debt for the excess was created to the company, at least until the sale was set aside, if in any event. *Johnson* v. *Lamping*, 450

GOLD DUST—See ACCOUNT, 6.

GRANT—See TIN STREAMING, 1.

INCORPOREAL HEREDITAMENTS.

1. *An incorporeal easement* is extinguished by unity of title and possession. *Coleman's Appeal*, 221

2. *A thing corporeal* can not be appended to a thing corporeal. *Id.*

INJUNCTION.

1. *Injury wrought by stopping colliery.*—Hazardous to grant an injunction to stay the working of a coal mine. *Clavering* v. *Clavering*, 358

2. *Classes of irreparable injury—Insolvent defendants—Chinese.*—Extracting minerals, flooding lands and excavating ditches are in the nature of irreparable injuries, as to which the denial of injunctive relief is tantamount to the denial of all protection; and the fugitive nature of the defendants is also to be considered. *Henshaw* v. *Clark*, 435

INTEREST.

1. *Interest* is to be paid upon the rents found to be due from the tenant in common in possession, to his co-tenants. *Early* v. *Friend*, 271

See ACCOUNT, 6.

JOINDER.

1. *No joint action, no joint responsibility.*—If the acts and threats of a person taken by themselves do not make a case which would support an

JOINDER. *Continued.*

action against him, his mere joinder in an action as a defendant with others who have severally, and without concert or collusion with him, done similar acts or made similar threats, will not create a liability on his part. *Keyes* v. *Little York Co.*, 96

2. *The cases governing the joinder of parties considered*, and *held*, that where an action for a tort is brought against several co-defendants, it is essential that the wrong complained of be joint. *Id.*

See PLEADING AND PRACTICE, 2, 4; TAILINGS, 5, 14, 15; TRUSTS, 8.

JURISDICTION—See TENANTS IN COMMON, 15.

JURY.

1. *Trial by jury in common law causes is a constitutional right*, and a law that any such causes shall be tried "agreeably to the course of a court of chancery" is obnoxious to the right and void. *North Penna. Co.* v. *Snowden*, 294

LACHES.

1. *Laches by co-tenant in objecting to sale.*—A and B being tenants in common, A, without any authority from B, contracted for the sale of the estate. B, on being informed of it, objected, and said the price was too low; but a mortgagee threatening to sell the estate under his power unless this sale proceeded, B allowed the matter to go on, and gave no notice to the purchaser that he dissented; an abstract was delivered and negotiations as to the title went on for about three years. *Semble*, that it was too late for B to object that the agreement was entered into without his authority. *Phillips* v. *Homfray*, 678

LAND OFFICE.

1. *Priority of applicants—Diligence no fraud.*—One who makes the first application for vacant land, and obtains a warrant, is to be preferred over another who makes a second application, though the former knew, when he had his application made out, that the other person had an application for the land prepared previously on the same day—the first applicant not being guilty of fraud. *Shoenberger* v. *Baker*, 412

LATERAL SUPPORT.

1. *Damages for removal of lateral support.*—The measure of damages is the actual loss of and injury to the soil; and it is immaterial that the defendant is not the owner of the land dug upon, but removes the soil therefrom for his own benefit by permission of the owner thereof. *Gilmore* v. *Driscoll*, 37

LEASE.

1. *Lease construed as to pillars and support.*—Where a mining lease stipulated that no pillars should be withdrawn within 600 feet of the shaft, and the whole clause relates to the manner of working the mine and the condition in which it should be left, it was held that the lessee was not by implication authorized to withdraw pillars or supports beyond the prescribed distance so as to cause a subsidence of the superincumbent soil. *Wilms* v. *Jess*, 56

2. *Lease, good without record.*—A lease is valid without record, be-

LEASE. *Continued.*

tween the parties and all others not entitled to the notice, which is the object of the recording acts. *Barnum* v. *Landon*, 250

3. *Lease as to surface—Contract as to mines.*—An agreement compelling a party to raise a certain amount of ore annually and concerning the use of farming land, *construed* as a lease of the surface but not of the mine. *Shaw* v. *Wallace*, 420

See ACCOUNT, 4; SURFACE, 1; TAX, 46; TENANTS IN COMMON, 8; TENANT FOR LIFE, 4; TRESPASS, 12.

LICENSE.

1. *License by single co-tenant—Variance.*—In trespass by several tenant in common a plea that defendants entered by license of the plaintiffs is not sustained by proof of such license from one of the co-tenants. *Murray* v. *Haverty*, 325

2. *License by two only out of three co-tenants—Basis of accounting between co-tenants.*—The plaintiff, a tenant in common of a coal mine had notice of a negotiation, which was followed by a lease for three year (in which he did not join), by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal, with license to work the coal. Under this license some coal, but considerably less than two thirds of the whole, was raised, and one third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the plaintiff filed his bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised, and an account against all the defendants as trespassers; for an injunction and receiver, and for damages: *Held*, that the working was not a trespass; and the plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less cost of getting and raising, and for payment of one third to plaintiff. *Job* v. *Potton*, 329

LIEN.

1. *Lien claimed by representer of claim.*—Where plaintiff contracted verbally with the owner of an interest in a mining claim to represent his interest at a certain rate, to be paid out of the proceeds: *Held*, that his contract created no lien against an innocent purchaser, without notice. *Jenkins* v. *Redding*, 647

2. *Judgment lien confined to specific property.*—Under the precedents in Pennsylvania, in a proper case the lien of a judgment and the execution on the judgment may, by the verdict of a jury, be restricted to specific lands, articles or proceeds. *Hoeveler* v. *Mugele*, 654

LOCATION.

1. *Fencing not necessary to possession of mining claim.*—Fencing a mining claim would serve no useful purpose except to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to the possession of such a claim. *Rogers* v. *Cooney*, 85

See TAILINGS, 2, 8, 10.

MEASURE OF DAMAGES.

1. *Ore leave, as basis of damages.*—A tenant of ore mines had under his title no means of obtaining his own share other than by taking at the same time the shares of his fellows. *Held*, that the value of the ore in place, ore leave, was the just basis of account in this case. *Coleman's Appeal*, 222

2. *Measure of damages—Contractor interfered with by owner.*—In trespass by a contractor under obligations to produce a certain output of ore, against the owner, for opening a new mine or shaft, it is error to instruct the jury that the proper measure of damages was such profits as the plaintiff would have realized by raising the ore which was raised by the defendant at the rate per ton which the plaintiff was entitled to receive under his contract. *Shaw* v. *Wallace*, 421

3. *Idem—Nominal damages.*—Unless the acts of defendant interfered with the beneficial working of plaintiff's mine, they were entitled to nominal damages only. *Id.*

4. *Profits and expense of maintaining the plant, as damages.*—In trespass for breaking a dam, by which the workmen were driven from the mines by the water, evidence of the amount each miner would produce and of the expense of keeping mules whilst the mines could not be worked, is admissible on the question of damages. *Douty* v. *Bird*. 454

5. *Malice—Measure of damages.*—Where there is evidence that the trespass is malicious, a court should not be too stringent in excluding evidence as to damage, but should wait and instruct the jury as to the true rule, to be given on the whole evidence. *Id.*

6. *Measure of damages for timber cut under claim of title.*—In an action of trespass for cutting timber on vacant land against a mining corporation where it is proved that the defendant's agent in good faith believed it was the company's land, the verdict ought not to be for a sum greater than will "cover the injury shown by the proof to have been inflicted." *Yahoola River Co.* v. *Irby*, 460

7. *The measure of damages* is the fair value of the coal *in place* and such injury to the land as the mining may have caused. *Forsyth* v. *Wells*, 493

8. "*Highest market price*" *not true rule of damages.*—Where judgment in trover for the conversion of mining stock was for the highest market price between the conversion and the trial, and far exceeded the market price at the time of conversion, no special damage being shown: *Held*, that the judgment proceeded upon a wrong theory of the measure of damages, and should be reversed. *Boylan* v. *Huguet*, 503

9. *Mining and carriage across boundary—Measure of damages—Way-leave allowed.*—The owners of a colliery worked across their line and extracted coal from adjoining lands and carried coal, to some extent, from mines of their own, through the workings under the land trespassed on. Upon bill for an account: *Held*, that the owner was entitled to the value of the coals gotten under his land, with an allowance for raising but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the defendants from their own land and carried under plaintiff's land. *Phillips* v. *Homfray*, 678

See ACCOUNT, 1, 8; LATERAL SUPPORT, 1; TROVER, 10; TRUSTS, 27; 28; TUNNEL, 3.

MINES.

1. *Contractor opening new mines.*—A contract by which a party is authorized to raise ore out of the mines on a designated tract, at a stipulated price, confers no authority to open new mines or to sink new shafts or slopes, except so far as such shafts or slopes may be necessary to the proper and successful working of the mines already opened. *Shaw* v. *Wallace*, 420

2. *Mines not implied, where specially mentioned.*—The general principle that a lease carries with it the mines upon the land, applies only when the contract relates to the land generally, without exception or reservation. *Id.*

See TAX, 49; TENANT FOR LIFE, 1; WASTE, 1,

MISTAKE—See TENANTS IN COMMON, 6; TROVER, 5.

MORTGAGE—See ACCOUNT, 5.

MUNICIPAL CORPORATION.

1. *Virginia city charter—Constitutional construction.*—Sections one and eight of article eight of the constitution of Nevada, so construed as to give validity to the new charter granted to Virginia city in March, 1865. *City of Virginia* v. *Chollar Potosi Co.*, 120

2. *Adjournments of meetings of county commissioners.*—The judges discuss the question as to the time when the meeting should be held, and the power of the commissioners after adjournment to revoke the order and meet at an earlier day. *State of Nev.* v. *Manhattan Co.*, 149

See TAX, 58.

NEGLIGENCE.

1. *Human agency aiding natural causes.*—That water will naturally descend is entirely consistent with its descent being so controlled or directed in a particular instance by accountable human agency as to work an injury to lands lying below, which would not otherwise have resulted. *Robinson* v. *Black Diamond Co.*, 93

2. *Mining for coal is a dangerous* occupation. *Barksdale* v. *Finney*, 541

NON-SUIT.

1. *Non-suit—When may be granted.*—When the plaintiff closes his evidence, if the court is of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a non-suit should be granted. *Ensminger* v. *McIntire*, 440

NOVATION.

1. *Creditor's suit against successor to corporation.*—A creditor of a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone. *Barksdale* v. *Finney*, 542

NUISANCE.

1. *Abatement of nuisance—Right to obstruct water-course.*—The plaintiffs, by parol license from L. and from the defendant, constructed a water-

NUISANCE. *Continued.*

course, and thereby discharged the water from their own mines across the land of L., and thence across the land of the defendant. The defendant, having revoked his license, upon the plaintiff's refusal to discontinue using the water-course, entered upon the land of L. at a spot near the boundary between it and the land of the plaintiffs, and obstructed the water-course. The defendant, by stopping the water-course on his own land, would have done less damage to the plaintiffs than was actually done, but more damage to L. and possibly some damage to the public: *Held*, that the water-course was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who, after the revocation of the license, were wrongdoers, was subordinate to the convenience of innocent third persons and of the public. *Roberts* v. *Rose*, 441

OFFICER.

1. *Ignorance of official duty no excuse.*—A person who undertakes any employment, and particularly that of a public office, must understand his duty, and he can not be excused for want of knowledge. *State of Nevada* v. *Kruttschnitt*, 130

OPTION—See TIME, 2; VENDOR AND PURCHASER, 12.

OUSTER—See TRESPASS, 8.

PARTIES.

1. *Those only who have an interest* in the *object* of a suit in equity are ordinarily required to be made parties. *Hamill* v. *Thompson*, 697

See TRESPASS, 15.

PARTNERSHIP—See TRESPASS, 15.

PARTITION.

1. *Agreement barring partition.*—The agreement that the Cornwall ore banks should remain undivided established a permanent tenancy in common, and partition could not be had without violating the covenant, which ran with the land. *Coleman's Appeal*, 221

2. *Partition implies title in severalty.*—In every partition there must be a severance so that each tenant shall enjoy his purpart in severalty. *Id.*

3. *The grantee of the right to dig ore*, under one of several tenants in common, can not enforce partition. *Boston Franklinite Co.* v. *Condit*, 301

PATENT.

1. *Inception of title.*—An application for land is not an inception of the title until it is filed in the land office and the office fees and purchase money paid to the Commonwealth. *Baker* v. *King*, 404

2. *Priority among applicants.*—A person had an application made out for land, and afterward, on the same day, another person had an application prepared for the same land, and whilst about having it prepared, he was informed of the previous application; the application of the second person was first filed in the land office: *Held*, that if there was no fraud or deception on his part, his warrant was entitled to prevail over the warrant issued on the application first prepared but last filed. *Id.*

3. *Idem.*—It was a material circumstance in favor of the title of the plaintiff in the ejectment, that he was a *bona fide* purchaser of the warrant first issued, and had received a deed from the warrantee after a decision in favor of such warrant by the Board of Property on a *caveat* filed by the second warrantee, in which the latter claimed by virtue of an actual settlement but without referring to his warrant, and that the plaintiff was without notice of claim under the warrant last issued or of the preparatory writings to obtain a warrant. *Id.*

PAYMENT.

1. *Money paid voluntarily* by one knowing, or having the means of knowing, his rights, *it seems*, can not be recovered back. *Irvine* v. *Hanlin*, 242

PERSONAL PROPERTY—See ACCESSION, 1; CLAIM, 1; REAL ESTATE, 1.

PLEADING AND PRACTICE.

1. *No record, no review.*—The Supreme Court will not consider questions argued before it, when the facts and proceedings upon which such arguments are based are not brought up in the record. *Rogers* v. *Cooney*, 85

2. *Misjoinder of causes of action.*—A cause of action on an official bond against the principal and his sureties can not be united with a cause of action for damages against the principal alone. *State of Nevada* v. *Kruttschnitt*, 130

3. *Judgment for official delinquency.*—A judgment for damages against an officer for official delinquency, which remains unsatisfied, will not prevent a subsequent action on the official bond. *Id.*

4. *Transfer of right of action against co-tenant—Joinder of administrator.*—The vendee of an undivided interest in land, upon which mining was going on at the time of his purchase, afterward procured an assignment from his vendor of all right of action on account of vendor's share of gold taken out; the court admitted this assignment in an action of account, against a co-tenant, under the objection that it was an assignment of a tort; afterward the administrator of such vendor was made party to the bill: *Held*, that the error, if any, was obviated by amendment. *Huff* v. *McDonald*, 262

5. *Trivial errors* will not justify reversal. *Murray* v. *Haverty*, 325

6. *Failure to deny damages.*—In trespass, where defendant fails to deny the amount of damages alleged in the complaint, although the alleged cause of the damage be denied: *Doubted*, whether the amount of damages was put in issue. *Rowe* v. *Bradley*, 431

7. *Points not made below* will not be considered above. *Id.*

8. *Forms of action under the code.*—Under our Practice Act it is immaterial whether the language used in the complaint be that belonging to one form of action or another, or to no form of action; the material question is, do the facts stated show that the plaintiff is entitled to any remedy, legal or equitable. *Kuhn* v. *McAllister*, 512

9. *Scope of prayer for general relief.*—If a complainant mistake the relief to which he is entitled, the court may, under the prayer for general relief, adjust its decree to the full equity of the case. *Hamill* v. *Thompson*, 697

See DISCLAIMER; VARIANCE; VERDICT.

POSSESSION.

1. *Claim held by occupancy—Trespass based on possession.*—A party who enters upon vacant public land, makes a survey and record, marks the boundaries of his claim, builds a cabin thereon for storing tools, and continuously thereafter engages in digging and milling the tailings which had been deposited on the land from the quartz mills above, thereby acquires such a possessory right to the land as will enable him to maintain trespass against an intruder who enters upon the land and begins to remove such tailings. *Rogers* v. *Cooney*, 85

2. *Possession of a mine by a drift* is possession to all depths and of all levels from the surface to the center of the earth. *Hugunin* v. *McCunniff*. 463

3. *Constructive possession always yields* to a possession in fact incompatible with the implication of law which creates it. *Id.*

4. *Double possession.*—Where two persons are in possession of land each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land. *Mather* v. *Trinity Church*, 472

5. *Possession under contract.*—Parties can not take and hold possession of a mining claim as vendees and be upheld in refusing compliance with their contract made in consideration of their receiving such possession and the right thereto. *Hitchens* v. *Nougues*, 649

See STATUTE OF LIMITATIONS, 2; TENANTS IN COMMON, 26; TRESPASS, 1, 6, 16, 18, 20; TROVER, 3; VENDOR AND PURCHASER, 7.

PRESCRIPTION—See TIN STREAMING, 1.

PRESUMPTION—See STATUTE OF LIMITATIONS, 2.

PUBLIC DOMAIN.

1. *Object of entry always admissible.*—A permit to enter on lead lands may be shown in an action of trespass by the United States, not as a justification, but to show the nature and object of the entry. *U. S.* v. *Gear*, 403

See TAX, 48.

RATIFICATION—See AGENT, 2.

REAL ESTATE.

1. *Title passes to the owner of the realty*, where personalty, though got by tort, is annexed to the realty. *Jackson* v. *Walton*, 488

See ACCESSION, 1; STATUTE OF FRAUDS, 3.

RELATION.

1. *Stamping of contract, retroactive in operation.*—A contract may be stamped after suit brought on it. *Logan* v. *Dils*, 663

See PATENT, 1.

RELEASE—See TENDER, 1.

RENTS AND ROYALTIES—See TENANT FOR LIFE, 3.

RES ADJUDICATA.

1. *Evidence aliunde upon plea of res adjudicata.*—Whenever a judgment in a former case is relied on as conclusive in another, it may be

RES ADJUDICATA. *Continued.*

shown by evidence *aliunde*, not inconsistent with the record, that the particular point was not adjudicated, if in law judgment could have been rendered on any other. *Coleman's Appeal*, 221

2. *The plea of judgment recovered* is mixed of matter of record with matter of fact. Although it appear by extrinsic evidence that the matter was within the issue in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration, it will not be conclusive. *Id.*

3. *Extent of ground held under judgment, shown in parol.*—The verdict and judgment did not establish title to the whole surface. It is always competent to establish by parol evidence, where it does not contradict the record, what the extent of the claim was upon which there has been a recovery. *Bronson* v. *Lane*, 349

RESCISSION.

1. *Mere inadequacy of price* is not sufficient to set aside a deed. It is sometimes regarded as a suspicious circumstance when coupled with other strong evidence of fraud. *Harris* v. *Tyson*, 634

2. *Refusal by vendee to pay.*—When the payment of the purchase money is a condition precedent to the delivery of the deed, the refusal to pay the whole or any balance due leaves the vendor at liberty to rescind the contract. *Hamill* v. *Thompson*, 696

3. *Discretion in decreeing rescission.*—Whether the rescission of a contract will be decreed rests in the sound discretion of the court, exercised with reference to all the equities of the case. *Id.*

See VENDOR AND PURCHASER, 16.

RESERVATION.—See SURFACE SUPPORT, 3, 5, 13; VENDOR AND PURCHASER, 11; TENANTS IN COMMON, 23.

SEVERANCE—See TAX, 6.

SHARE—See STOCK, 5.

SHERIFF'S SALE.

1. *Purchasers at sheriffs' sales.*—It is the policy of the law to favor purchasers at sheriffs' sales, as against debtors in the execution whose debts have been paid by the purchasers, but not as against third persons. *Irwin* v. *Harris*, 534

SPECIFIC PERFORMANCE.

1. *Misrepresentation defeats specific performance.*—A misrepresentation of an occult quality in land (as to the existence of iron ore), although it be made in ignorance of the truth, and although the vendee agrees to run the risk of this, in an action to procure specific performance of the contract of sale, is a decisive objection to plaintiff's recovery. *Fisher* v. *Worrall*, 624

2. *Secret mining before purchase.*—The owners of a colliery entered into a contract with an adjoining land owner for the purchase of his estate without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it: *Held*, that the court would not enforce the contract at the suit of the purchasers, though the sale was not shown to be at an under-value. *Phillips* v. *Homfray*, 677

SPRINGS.

1. *Springs tapped.*—The loss of springs to the owner of the surface by reason of the ordinary working of the mines, does not render the owner of the minerals liable for damages. *Coleman* v. *Chadwick*, 9

STATUTES.

1. *When the object is plain and the language unequivocal*, effect must be given to the law by the courts, but burdens are never to be imposed upon citizens upon vague or doubtful interpretations. *Stanley* v. *Little Pittsburg Co.*, 215

STATUTE OF FRAUDS.

1. *Verbal agreement to reduce to writing.*—The fact that the party receiving a conveyance of land verbally agreed at the time, with the person paying the consideration, that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust *express* as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the Statute of Frauds. *Baylis* v. *Baxter*, 561

2. *The Statute of Frauds* does not apply to a trust which is raised as a legal result from the facts. *Id.*

3. *Mining claim is real estate.*—A gold mine is real estate, and an interest therein other than an estate at will or a lease not exceeding one year, must be created by operation of law or by an instrument in writing. A verbal sale will not pass title. *Melton* v. *Lombard*, 695

STATUTE OF LIMITATIONS.

1. *Knowledge of co-tenant.*—If one tenant in common receive more than his just share of the proceeds of gold washings, the Statute of Limitations does not commence to run in his favor, so as to bar an action of account by the co-tenant, until the tenant begins to hold such surplus adversely to the co-tenant, and knowledge of that fact comes to the co-tenant. *Huff* v. *McDonald*, 262

2. *Presumption of grant, in favor of possession.*—After a possession of ninety years in a thickly settled part of the State, building a church on part of the land and occupying part as a burial ground, a grant of land, or at least a pre-emption right from the commonwealth sufficient to recover in ejectment, will be presumed. *Mather* v. *Trinity Church*, 472

3. *Statute of Limitations, in equity.*—The Statute of Limitations is applied with the same effect in a court of equity as in a court of law, although a bill in equity may have a much wider scope as to parties and the subjects embraced by it than a suit at law. *Bickell's Appeal*, 592

4. *Idem—Complete adjudication in equity.*—A court of equity, having obtained jurisdiction over the parties, may settle every matter in dispute between them touching the controversy, near or remote, direct or collateral, yet it can not directly or indirectly reach beyond the statute. *Id.*

5. *Facts insufficient to prevent the bar of limitation.*—O. having a right of action against the executor of P., which arose in 1856, brought suit therefor in 1857. In 1867 O. and the devisee of P. executed an agreement, under the terms of which O., in 1868, discontinued the suit against the executor of P. In 1869 O. filed a bill in equity against the executor

STATUTE OF LIMITATIONS. *Continued.*

of P. and his devisee, asserting that this agreement was void because the devisee, who was a married woman, had not properly executed the same, and praying that the agreement might be set aside, and O. reinstated in all the rights he had surrendered thereunder: *Held*, that neither as to the executor nor the devisee did the action of 1857 toll the Statute of Limitations which thus began to run in 1856. *Id.*

STOCK.

1. *Capital stock presumed to continue.*—Capital stock paid into a corporation authorized to transact business, and divided into shares, is presumed to remain until its dissolution. *Com.* v. *Ocean Oil Co.*, 126

2. *Income—Dividends.*—The net income of a corporation is liable to taxation, whether declared in dividends or not. *Id.*

3. *There is no special value or property in any particular share* of mining stock, as distinguished from any other share, unless issued in the name of a party and charged to him upon the books of the company. *Boylan* v. *Huguet*, 533

4. "*Shares*" *of stock in conversion.*—Shares of stock in an incorporated company are recognized as a subject of conversion, and suit can be maintained therefor and a recovery of the value had. *Kuhn* v. *McAllister*, 512

5. *Certificates and shares distinguished.*—An action in the nature of trover will lie under modern decisions for the conversion of *shares of stock* as well as for the mere *certificate*. The scope of the action has been enlarged from what it was at common law. *Payne* v. *Elliott*, 515

6. *Relation of stockholder to the corporation.*—Where the stock of a corporation is declared to be personal estate and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders. The certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and, on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities. *Barksdale* v. *Finney*, 542

See MEASURE OF DAMAGES, 8; TROVER, 8, 9; TRUST, 17, 19; VENDOR AND PURCHASER, 10.

SURFACE.

1. *Obligation to restore the surface.*—Where there is an agreement between the owner and his tenant that, when the mines are worked out, the surface shall be restored, the owner may complain, if it be not restored: but that gives no claim to any one else. *Wilson* v. *Waddell*, 26

2. *Surface defined.*—The term surface is held to include, not merely the geometrical surface, but as well all strata superincumbent upon the mineral strata granted. *Yandes* v. *Wright*, 32

See TAX, 59; TENANTS IN COMMON, 23.

SURFACE SUPPORT.

1. *Custom to leave no support.*—The mining right is servient to the surface to the extent of sufficient support, and a custom to remove the

SURFACE SUPPORT. *Continued.*

ribs and allow the surface to sink, is not reasonable, nor of sufficient continuance to be good. *Horner* v. *Watson*, 1

2. *Natural right.*—Of natural right the surface land is entitled to support from the strata below. *Coleman* v. *Chadwick*, 9

3. *Support at expense of the mineral.*—When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface. *Id.*

4. *Custom to let down.*—A custom contrary to such right would not be reasonable and, therefore, would be invalid. *Id.*

5. *Implied reservation of support.*—A grant of minerals and all privileges necessary for the convenient working, etc., of coal, and the rights "incident or usually appurtenant to working and using coal mines," does not affect the grantor's right to surface support. *Id.*

6. *Subsidence of land aided by excavations on intervening land.*—Between the land of the plaintiffs and that of the defendants, who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was that when the defendants worked the coal under their land, subsidence was caused in the surface of the plaintiffs' land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' working: *Held*, (affirming the decision of the Master of the Rolls), that the plaintiffs had no right of action against the defendants. *Birmingham* v. *Allen*, 14

7. *The support to which a land owner is entitled* from the adjacent land is confined to such an extent of adjacent land as, in its natural, undisturbed state, would be sufficient to afford the requisite support. *Id.*

8. *Right to exhaust minerals.*—The right to work mines is a right of property, which, when duly exercised, begets no responsibility. The owner of minerals has a right to take away the whole of them in his land, according to the natural course of user. *Wilson* v. *Waddell*, 25

9. *Subsidence of surface—Injuries by consequent waterflow.*—Where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall, into an adjacent lower coal-field, the injuries being entirely from gravitation and percolation, are not a valid ground for any claim of damages. *Id.*

10. *Mine subject to servitude of support.*—The grantee of minerals takes his right under the servitude that he will support the surface above his mine, and this servitude holds though it may not be possible to work the mine and yet leave a sufficient support. *Yandes* v. *Wright*, 32

11. *Upper seam entitled to support from lower.*—Where support is taken away an action lies; and in this case recovery by the owner of an upper coal seam against the owner of the lower seam was upheld. *Id.*

12. *Right to support of soil, absolute; to support of improvements, dependent.*—One who digs a pit on land so that, by the operation of natural and ordinary causes, which he takes no precautions to guard against, the land of another fall into the pit, is liable to an action by the latter for the injury to his land in its natural condition, but not for in-

SURFACE SUPPORT. *Continued.*

juries to buildings or improvements thereon, such as fences and shrubbery, without proof of actual negligence. *Gilmore* v. *Driscoll*, 37

13. *Reserve of mines without obligation to support surface.*—Where one grants the surface of land and reserves the mines beneath, the implied right of support to the surface, which passes with the grant, may, by apt words in the deed, be excepted therefrom, and where such exception has been made, the grantor, or those who claim through him, may mine all the coal, even though by such mining the surface should fall in. *Scranton* v. *Phillips*, 48

14. *Exemption, by contract, from liability for caving.*—Where A sold land, reserving to himself "all the coal" therein and the right to mine the same by any subterranean process, but without the right to enter upon the surface, and in the contract of sale provided that he should be exempt from any liability for any injury resulting to the surface from the mining: *Held*, sufficient to exempt A and his assigns from liability for damages resulting from the caving in of the surface from mining. *Id.*

15. *Mine owner bound to support surface.*—Where the surface belongs to one and the minerals to another, without qualification other than the fact of severance, the owner of the minerals must leave support sufficient to maintain the surface in its natural state. *Wilms* v. *Jess*, 56

16. *Support of servitude on the mine.*—The rule is well settled that when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the mineral as he can get without injury to the superincumbent soil. *Id.*

17. *Incidental weight of buildings.*—Although the mine owner is not bound to leave support more than sufficient to stay the surface, yet, if a subsidence occur, the mere presence of a building will not prevent a recovery, unless it be shown that the subsidence would not have occurred without the aid of the buildings, and the mine owner will be liable for the damage, both to the building and to the land. *Id.*

18. *Idem—Where subsidence caused by added weight.*—The act of removing all supports from the superincumbent soil is, *prima facie*, the cause of its subsequently subsiding; but if the subsidence is, in fact, caused by the weight of buildings erected on the surface after the execution of a lease to the defendant authorizing him to take the mineral beneath the surface, that may be shown in defense as contributive negligence. *Id.*

19. *Common law right as affected by contract.*—In common right, the person who owns the surface has a right to have it properly supported below by minerals. A court of law has to look at the documents to see whether the parties have agreed upon something different from the common right. *Davis* v. *Treharne*, 60

20. *Surface destruction not allowed by implication.*—Nor did the words that the mining lessee should have the right to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works and things upon, in or under or above the said premises as shall be necessary or convenient for working and carrying away the same," making compensation, etc., enlarge the power so to deal with the mines as to let down the surface. *Id.*

See LEASE, 1; WORKINGS, 1.

TAILINGS.

1. *Property in tailings.*—The pay dirt, and under certain circumstances the tailings, are the property of the party producing them. *Jones* v. *Jackson*, 72

2. *Locating place of deposit for tailings.*—When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose, provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. *Id.*

3. *Allowing tailings to mingle.*—If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass; but it may be a circumstance to prove an intention of abandonment. *Id.*

4. *Where tailings are allowed to flow upon the ground of another,* he becomes entitled to them. *Id.*

5. *Joint damage by tailings of defendants and others.*—Where an injury is caused from the tailings and refuse from a number of mining claims it is allowable to ask a witness as to the effect of throwing in such refuse by defendants "and other miners," leaving it to the cross-examination to bring out the facts and to the instructions to protect the defendant from any responsibility except what he incurred by his own acts *Reel* v. *Schultz*, 77

6. *No absolute right to free tailings.*—The first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, regardless of mining claims of subsequent locators below them. *Lincoln* v. *Rodgers*, 79

7. *Custom of free tailings restricted.*—The proof of a custom allowing tailings to run free, will not justify the first locators in allowing their tailings to run so freely as to prevent mining operations below. The doctrine of free tailings can not, without restriction, be maintained. *Id.*

8. *Location of claim, specially for tailings.*—Where persons locate ground for the purpose of constructing a flume, they can locate any number of feet not in violation of the mining regulations of the district, and, if there are no regulations, not exceeding a reasonable amount for the deposit of tailings or dump; but the boundaries must be fixed. *Id.*

9. *Necessary injuries to lower claims.*—Under peculiar circumstances, the first locators, in the reasonable prosecution of their mining operations, might be justified in working some necessary injury to locators below, which injuries would be *damnum absque injuria. Id.*

10. *Location of tailings claim.*—If land be valuable only for the tailings deposited upon it, and it is claimed by neither party for any other purpose, the acquisition of title to it should be governed by the rules ordinarily controlling the acquisition of title or the right of possession to mining claims, which do not demand the same acts as are required to obtain actual possession of agricultural land. *Rogers* v. *Cooney*, 85

11. *Tailings an accretion to the land.*—Where a plaintiff was found to have the possession of certain land upon which tailings were deposited, and defendant to have intruded and removed a portion of such tailings:

TAILINGS. *Continued.*

Held, that plaintiff's right to the tailings was co-extensive with his right to the land. *Id.*

12. *Right to run tailings through another's flume.*—A party mining upon a ravine which runs into another ravine is not clothed, by virtue of his right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in, at any point he may select, upon the tail-race of another constructed upon the other ravine. *Gregory* v. *Harris*, 91

13. *Letting loose sediment down on neighbor's land.*—Where a party engaged in coal mining allows water, clay and sand to descend in a flowing mass upon the below-lying land of another so as to destroy its value for cultivation, and such descent is the direct result of the act of such party, and not the mere result of the law of gravitation, the person whose land is thus injured may recover damages, and enjoin the future commission of said acts. *Robinson* v. *Black Diamond Co.*, 93

14. *Common results of mingled tailings.*—The complaint stated that the defendants were miners, severally engaged in hydraulic mining, the several mining properties of defendants lying within a radius of seven miles upon the hilltops adjacent to Bear River; that the tailings of the several mining claims were swept down the river and deposited upon the lands of the plaintiff so as to destroy their value. It prayed an injunction restraining the flow. The defendants demurred on the ground of a misjoinder in that it did not appear by the complaint that the defendants jointly committed any of the acts complained of: *Held*, that the demurrer was well taken. *Keys* v. *Little York Co.*, 95

15. *Idem—Basis of the holding.*—There is no principle of equity which would make a person responsible for a wrong that he has neither done nor threatened to do. *Id.*

See ABANDONMENT, 1.

TAX.

1. *Salable value.*—The law requires all property to be assessed for taxation at its actual value; the amount it will sell for at public sale made under authority of law is a good *prima facie* criterion of such value, and will not be overcome by a valuation made by an assessor, with the consent of the owner, in a previous year. *State* v. *Randolph Township*, 103

2. *The income* of property is no criterion for an assessor, in making a valuation. *Id.*

3. *Comparative valuation, no test.*—If other lands in a township are assessed much below their value, it is no ground for setting aside an assessment made upon a correct valuation; but the remedy of the latter is to appeal from his assessment, and at the same time apply to the commissioners of appeal to raise such assessment as may be too low. *Id.*

4. *Where an assessment is reduced* by the commissioners of appeal, the assessment merges in the judgment of the commissioners; and in the absence of any evidence that the amount fixed by the commissioners is too great, the court will not interfere. *Id.*

5. *Reduction, pro tanto.*—If more tax is assessed than authorized by the proper authorities, the assessment will be set aside to the extent of

TAX. *Continued.*

such excess, and each person against whom an assessment is made will be entitled to a reduction, in proportion to the amount of his assessment. *Id.*

6. *Taxation after severance of surface and mineral rights.*—Where the owner of coal land has sold the right to take all the coal that is in his land, and retained the land itself, the owner of the land and the owner of the coal are each taxable according to their several interests. *Logan* v. *Washington County*, 108

7. *Idem—Separation not to increase valuation.*—But this principle does not justify a higher valuation on the two interests, taken separately, than there would have been if both had continued in the same person. *Id.*

8. *Mining claim is taxable.*—The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property. *State* v. *Moore*, 110

9. *Property in claims always recognized.*—The whole course of legislation and judicial decisions in this State, since its organization, has recognized a qualified ownership of the mines in private individuals. *Id.*

10. *The term "property in lands,"* is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which private individuals have acquired in the same. Exemption from taxation is a privilege of the government, not an incident to the property. *Id.*

11. *Conjectural value of mining claim.*—There is no force in the objection that the value of a mining claim, which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture. *Id.*

12. *Value, standard of.*—The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands. *Id.*

13. *Exemption not to be evaded.*—The legislature having expressly exempted mining claims from the operation of the Revenue Act, it can not be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. *Id.*

14. *Money invested in the purchase and opening of mining claims*, is not within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce or business whatsoever." *Id.*

15. *Possessory rights to mining claims are property*, and, as such, taxable. *Hale & Norcross Co.* v. *Storey County*, 115

16. *Taxation of the possessory right is not a violation of the organic act* which prohibits the territorial legislature from taxing the property of the United States. The object of the section was to protect the government, and not to prevent the taxation of settlers on public lands. *Id.*

17. *Ore tax in Nevada.*—Ore is personal property, and, as such, liable to taxation for municipal purposes. An assessment of the proceeds of

TAX. *Continued.*

mines which deducts from the gross yield $20 per ton, and 25 per cent. from the remainder, and subjects the balance to the same *ad valorem* tax as other property, is an equal and uniform taxation of that class of property under the constitution. Where, on refusal of the owner to list all his ore, it is rated at $500 per ton, it may seem a harsh rule, but it is for the refusal to list, and is no more than a just penalty. The fact that ore had been removed from the city before the passage of the ordinance, but during the annual period or fiscal year for which the tax was levied, is no cause for deduction of such ore from the total of annual proceeds. *City of Virginia* v. *Chollar Potosi Co.*, 120

18. *Tax on out-put—Mines exempt.*—The constitution of Nevada exempts mines and mining claims from taxation, and says that the proceeds alone shall be taxed. *Id.*

19. *Tax on corporate net income—Income defined.*—An oil company was incorporated with a capital of $1,000,000, which was invested in oil land. Their dividends were only from the produce of oil wells, and were credited to the capital stock invested. The company claimed that they were not liable to tax on net income, until the proceeds from oil had repaid all the capital: *Held*, that the income from their works, after deducting expenses, was the net income to be taxed. *Com.* v. *Ocean Oil Co.*, 126

20. *Sworn statement must show amount and value of product.*—The revenue laws require the sworn statement of the product of a mine to show the amount of such product in weight, and not merely the amount in dollars; they require both the amount and value to be given. LEWIS and JOHNSON, JJ. *State* v. *Kruttschnitt*, 130

21. *Review of the Nevada system of taxing ores* with the *dictum* that the tax on ores is more favorable to the mining interest than would be direct taxation of the mines. *Id.*

22. *The collection of ore tax quarterly* does not amount to more than a regular *pro rata* tax on the whole annual proceeds, and does not operate to make the mines pay more than that, even when the item of interest is considered. *Id.*

23. *The difference in value between gold and currency* is not affected by the fact that both are legal tender; and the recognition of this fact in the revenue system is essential to produce uniformity of assessment. *Id.*

24. *Sworn statements not conclusive.*—The assessor is not bound by the sworn statements required by law to be furnished him by the taxpayer. *Id.*

25. *The formula of assessment* stated in detail in the opinion of BEATTY, C. J. *Id.*

26. *Assessment roll in hands of collector can not be altered.*—Neither an assessor nor a district attorney can alter an assessment roll after the same has been turned over to the collector of taxes. *State* v. *Manhattan Co.*, 149

27. *Transcript must show facts directly.*—To establish a fact so that the Supreme Court can act upon it, a transcript must show evidence introduced in relation to it, or an admission of it by opposite counsel, or a

TAX. *Continued.*

certificate of the judge who tried the case to that effect, or a positive statement of the circumstances as having, in some way, been shown on the trial. *Id.*

28. *State taxes need not be levied by county commissioners.*—The levy of State taxes by the commissioners, though provided for in the revenue laws, is an idle ceremony, for the reason that the levy is made by the legislature. *Id.*

29. *County taxes must be levied by the commissioners.*—The amount of taxes for county purposes must be fixed and levied by the commissioners. *Id.*

30. *No equalization of taxes necessary where no injustice complained of.*—There is no necessity of an equalization of any assessment roll, unless some one complains of injustice in the assessment. *Id.*

31. *Complaints as to assessments on proceeds of mines.*—A taxpayer on the proceeds of mines may complain of inequality of assessment upon him at any time before the taxes are collected or sued for. *Id.*

32. *Special tax on stock of foreign mining corporations.*—The tax of a certain percentage upon the par of its capital stock imposed upon foreign mining corporations "having an office or place of business within this Commonwealth" is not in conflict with the State or United States Constitution; nor was the section imposing such tax in any respect annulled by the statute of 1866, c. 291. *Att'y Gen.* v. *Bay State Co.*, 158

33. *Mining claim taxable—California Enabling Act.*—A mining claim on the public lands of the United States is taxable to the claimant without violation of the clause of the act admitting California into the Union, which prohibits taxation of the lands of the United States. *People* v. *Black Diamond Coal Co.*, 162

34. *Exemption Act construed to be void.*—The General Revenue Act of California, in so far as it attempts to exempt possessory claims and improvements upon the public mineral lands from taxation, is void. *Id.*

35. *Income—Exhausted coal.*—The value of the coal exhausted of the *capital* of a coal company is not to be deducted from the receipts in estimating its net earnings. *Com.* v. *Penn Co.*, 163

36. *Taxes on proceeds of mines—When the "$15 per ton" exemption applies.*—The act of February 28, 1871, for the taxation of the net proceeds of mines, (Stats. 1871, 87) in providing "that an additional exemption of $15 per ton may be allowed on all ores worked by Freiburg, or dry process," does not authorize an exemption of $15 per ton on all ores so worked in addition to the actual cost of working them, but only where such actual cost exceeds sixty per cent. of the gross yield. *State* v. *Eureka Co.*, 165

37. *Legislative intent of act to tax net proceeds.*—In the act for the taxation of the net proceeds of mines, the legislative intent obviously was, first, to tax the gross yield less the actual cost; second, to limit a maximum, beyond which not even actual cost should be deducted; in other words, to exempt only the actual cost, provided it did not exceed sixty per cent. of the gross yield in case of ores worked by wet process, and sixty per cent., together with $15 per ton, in case of ores worked by dry process. *Id.*

TAX. *Continued.*

38. *Omission of "dollar mark" in tax assessment roll.*—In an action to recover delinquent taxes on net proceeds where plaintiff was allowed to introduce the original assessment roll, notwithstanding there was no dollar mark attached to the figures purporting to indicate the amount of the tax and it was objected to on that ground: *Held*, that the fair presumption, in the absence of aught to the contrary, was that the figures in the perpendicular columns in the form prescribed by statute indicated dollars and cents, and that the admission of the roll in evidence was not error. *Id.*

39. *Sufficiency of delinquent tax assessment roll.*—Where a delinquent assessment roll, objected to for want of the "dollar mark," had such mark prefixed to all the columns except the last, headed "total amount of tax," which, however, was added up and the mark prefixed to the sum total: *Held*, that such roll furnished sufficient legal evidence to enable a court to determine with certainty the amount of the tax, and that in a suit for delinquency such roll was all the plaintiff need introduce to make out a *prima facie* case. *Id.*

40. *Irrelevant matter in "statements" of proceeds of mines.*—Matters inserted in a statement of the proceeds, such as is required to be furnished by the mining tax law, the insertion of which is not authorized by the statute, go for nothing, and the assessor is not bound to pay any regard to them. *Id.*

41. *Object of notice by assessor of unpaid taxes on mines.*—The written notice required by section 7 of the mining tax law, to be given by the assessor to parties engaged in reducing ores, is not a prerequisite to liability of the producer for the tax, but only intended to hold a party reducing ores extracted by others to the extent of the value of the ores in his possession when notified. *Id.*

42. *Quarterly collections.*—There is nothing in the use of the word "manner" in section 10 of the mining tax law, which provides that the collection shall be enforced in the same manner as on other kinds of personal property, to prevent the collection of such taxes quarterly; the word "manner" as there used does not mean "time." *Id.*

43. *Special tax against particular mine owners upheld.*—An act provided that in addition to taxes then collectible, owners of ore beds in Upper Saucon township should pay to the supervisors 1½ cents for every ton of ore mined and carried away with teams over the roads in the township, to be paid at the end of each six months, and in default of payment to be collected as debts of like amount: *Held:* that the act was constitutional. *Weber* v. *Reinhard*, 175

44. *Inequality does not make tax unconstitutional.*—The court can not pronounce a tax unconstitutional on the ground of its injustice and inequality. It infringes on that ground no provision of the constitution (of Pennsylvania). *Id.*

45. *Collection by action.*—It is competent for the legislature to provide for the collection of a tax by action in the courts. *Id.*

46. *Landlord liable.*—The owner of land had leased it for a term of years: *Held*, that he, and not the lessee, was liable for the tax. *Id.*

47. *Tonnage tax on ore, held void.*—The statute (laws 1865, p. 244)

TAX. *Continued.*

imposing a specific tax upon corporations and companies engaged in mining, smelting and refining ores in this State, which provides for the payment of a tax of one and a half cents per ton on all iron ore or mineral obtained and exported from the State before being smelted, but exempts from taxation all that is smelted within the State, is held void as an attempt, in effect, to impose a tax upon interstate commerce. *Jackson Co.* v. *Auditor Gen.*, 182

48. *Ore out of U. S. lands.*—Although the title to mineral lands may remain in the United States, the ores when dug or detached from the lands under a mining claim, are free from any lien, claim or title of the United States, and becoming personal property are, as such, subject to the State taxation in like manner as other personal property. *Forbes* v. *Gracey*, 183

49. "*Mines*" *and* "*mining claims*" *distinguished.*—The words "mines or mining claims" in the sixth section in the act of the legislature of Nevada of Feb. 28, 1871, imposing a tax upon ores, and making it "a lien on the mines or mining claims from which the ores or minerals bearing gold or silver are extracted for reduction," were evidently intended to distinguish between cases in which the miner is the owner of the soil, and, therefore, has a perfect title to the mine, and those in which he works under a mining claim, the title to the land remaining in the United States. In the first case the tax is a valid lien on the mine itself; but in the second only upon his possessory right, under existing laws and regulations, to work and explore the mine. *Id.*

50. *Claims are taxable property.*—A mining claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for the non-payment of them, without infringing the title of the United States. *Id.*

51. *Silver bullion* is such property as is liable to taxation. *Hope M. Co.* v. *Kennon*, 189

52. *The exemption of mines from taxation* does not extend to the product of such mines. *Id.*

53. *Exemption is the exception* and taxation the rule. *Id.*

54. *Duplicate taxation.*—The fact that the stock of a mining corporation is divided into shares and that these shares are subject to taxation, does not make the product of its property exempt; if such result amount to duplicate taxation it is not, therefore, invalid. *Id.*

55. *Tax on oil pipe line.*—A corporation engaged in the removal of petroleum from place to place by means of pipes, is a transportation company within the meaning of the 4th section of the act of April 24, 1874, and the 5th section of the act of March 20, 1877, and is subject to the tax imposed by said acts. *Columbia Co.* v. *Com.*, 197

56. *Losses not deducted.*—The act of 1874 requires transportation companies to pay annually a tax "at the rate of nine tenths of one mill upon its capital stock for each one per cent. of dividend made or declared by such company." *Held*, that the amount contributed by the stockholders to pay a loss incurred by the corporation can not be deducted from the amount of this taxable dividend, as made or declared. *Id.*

TAX. *Continued.*

57. *Exemption of mines from taxation does not exempt improvements.*—Article 10 of the Constitution of Nevada, which restricts the power of taxation to the "proceeds alone" of "mines and mining claims," does not forbid the taxation of permanent engines, hoisting works and machinery affixed to the soil, nor yet personal property not affixed to the soil and used in carrying on the work of the mine. *Town of Gold Hill* v. *Caledonia M. Co.*, 202

58. *Municipal taxation of property not benefited by municipality.*—The legislature having power to establish a municipal corporation and to confer upon it the power to levy taxes upon property within its corporate limits, courts will not inquire whether, in the exercise of this power, property is taxed which is not correspondingly benefited by its location within such limits, for the purpose of determining the legality of the tax. *Id.*

59. *Surface exempt.*—Surface ground taken up as part of a mining claim is clearly within the words used in the constitution exempting "mines and mining claims" from taxation. *Id.*

60. *Delinquent list.*—The failure to enter the tax on the delinquent list before the commencement of the action is not essential to a recovery. *State* v. *Northern Belle Co.*, 211

61. *Second assessment.*—Where the assessor has made an irregular and void assessment this does not invalidate a second assessment made in conformity with the law. *Id.*

62. *Time of assessment.*—The statute prescribing the time for making assessment on ore-proceeds is directory merely; any irregularity in that respect is a defense only to the extent that the taxpayer has been injured thereby. *Id.*

63. *Exemptions under Nevada statute.*—A company working ores on the Freiberg process is not entitled to an exemption of $15 per ton in addition to the actual cost of reduction. *Id.*

64. *No tax on proceeds directed by statute.*—There is no provision, constitutional or statutory, which in terms requires the levy of a tax upon the annual net proceeds of mines and mining claims bearing precious metals. *Stanley* v. *Little Pittsburg Co.*, 214

65. *Property owned at date of assessment.*—As a rule the statute does not require that a corporation or an individual shall be liable to taxation for personal property owned at any time during the fiscal year, but only upon what was owned on the 1st day of May. *Id.*

66. *Taxation a matter for the legislative department.*—It is a fundamental rule that it belongs to the legislative department to determine the person and objects to be taxed and to provide the necessary mode and provisions to make the law effective; also that great caution is to be exercised in construing a law imposing taxation, in order to arrive at the intention of the law-giver, for it is the intention that it is to be enforced. *Id.*

67. *The annual amount of the net proceeds of mines* is not liable under the statute, to taxation as such. *Id.*

See CORPORATIONS, 1; STOCK, 1, 2.

TENANTS IN COMMON.

1. *Title to Cornwall ore banks.*—Coleman and Grubb owned together large quantities of real estate, including the Cornwall ore banks. They selected men to part and allot the real estate, agreeing that the Cornwall ore banks should remain together and undivided as a tenancy in common, because of the impossibility of ascertaining the extent and limits of the ore, and because partition could not be made without great injustice to some of the parties. In amicable actions to carry out the partition, the court adjudged that the "ore banks, etc., do still remain undivided, to be held by (the parties) as tenants in common, according to their respective shares." *Held*, that the parties and their successors were tenants in common of the ore banks. *Coleman's Appeal*, 221

2. *Plea of non tenent insimul.*—Under the plea of *non tenent insimul*, it may be shown that the parties had barred themselves by covenant from partition. Such plea is the general issue, and means that the parties do not hold together so as to be entitled to partition. *Id.*

3. *Division of profits by several workings.*—The agreement provided that neither of the parties should interfere or interrupt the others at any mine holes by them opened and occupied for the purpose of raising ore: *Held*, that this was not a mode of providing for the enjoyment in severalty of the shares of the parties. *Id.*

4. *Idem.*—This provision meant that the parties should be undisturbed in their rights as tenants in common to take and use their respective proportions of ore, and was a grant to open and occupy other mine holes. *Id.*

5. *Usufruct.*—As to *fructus industriales*, a tenant in common does not receive more than his share, within the statute of Anne, if he merely has the sole enjoyment of the property, though, by the employment of his own industry and capital, he makes a profit by the enjoyment and takes the whole of it. *Id.*

6. *Assumpsit—Ore paid for by mistake.*—One tenant in common can not maintain assumpsit against another to recover the price of certain ore, paid by the former to the latter under the mistaken supposition that the latter, the defendant, had exclusive title to the land where the ore was dug. Account-render would be the proper remedy. *Irvine* v. *Hanlin*, 241

7. *Expenses of litigation.*—The defendants while in possession of the premises incurred expenses in defending their title at law against a person claiming by title paramount: *Held*, that the complainants were not bound to contribute their proportion of expenses in defending against such suit. *Allen* v. *Barkley*, 246

8. *Lessees are co-tenants.*—A lessee of a part interest is a co-tenant, and as such liable to action of account. *Barnum* v. *Landon*, 250

9. *Each liable to all the others.*—A co-tenant can not mine so as to extract just his proper proportion of the mineral and refuse to account. He owns only his proper proportion of what he takes out and must account for their proportions to his co-tenants. *Id.*

10. *Measure of accountability to co-tenant.*—If one tenant in common receive more than his just share of the proceeds of gold washings, he is

TENANTS IN COMMON. *Continued.*
liable to account to his co-tenants for such surplus, and for all the profits which he makes out of such surplus; and if there is proof that he used such surplus, and no proof as to whether he made any profits out of it or not, the presumption is that he made profits out of it, and profits at least equal to the interest on the value of such surplus calculated at the legal rate. *Huff* v. *McDonald*, 262

11. *Property occupied exclusively by one of the co-tenants.*—Whenever the nature of the property is such as not to admit of its use and occupation by several and it is used and occupied by one only of the tenants in common, or when the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion within the meaning of the statute. *Early* v. *Friend*, 271

12. *Co-tenants unwilling to adventure the risks* have no right to claim any share in the profits. They are entitled only to their proportion of a fair rental value of the premises. *Id.*

13. *Shaft to get the common minerals, opening on separate estate.*—The owners of contiguous estates who were tenants in common of the mines beneath, *held*, equally entitled to the landing rent paid on foreign coal, raised through a shaft which had been constructed by a lessee of the mines held in common, but which opened at surface on land which was the separate estate of one of the owners. *Clegg* v. *Clegg*, 289

14. *Expenditures made by a tenant*, inure to the benefit of all the lessors; it is not the individual outlay of the tenant, but accrues to the common benefit of the associate in the common purpose under which the tenant worked. *Id.*

15. *Jurisdiction of equity.*—A court of equity has no jurisdiction of a bill brought by one tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges, founded on legal title, until those rights have been established at law. *North Penn'a Co.* v. *Snowden*, 294

16. *Joint tenants.*—A conveyance to two *without* the words "to be held as joint tenants and not as tenants in common" creates a tenancy in common, without survivorship; and a deed to trustees is to be construed in the same manner. *Boston Franklinite Co.* v. *Condit*, 201

17. *One tenant in common can not convey* his right to any specified portion of the premises or any right in the same, as the right to dig ores, to the prejudice of his co-tenants. Such conveyance is void as to the co-tenants though good as against the grantors. *Id.*

18. *Several use of common property.*—Tenants in common may use and enjoy the common property severally and need not account for the rents and profits, except under the statute for so much as they may receive beyond their just share. *Graham* v. *Pierce*, 308

19. *Measure of co-tenants' accountability.*—The best measure of the accountability of one who uses the common property severally is his co-tenant's share of a fair rent of the property so used; but under peculiar circumstances resort will be had to an account of issues, profits, etc. *Id.*

20. *Single co-tenant may not mine.*—Tenants in common are seized

TENANTS IN COMMON. *Continued.*

of each and every part of the estate but it is not in the power of one to convey the whole, or the whole of a distinct portion, or to give a valid release for injuries done thereto, or to commit waste or to destroy the common property or do any act that will work a permanent injury to the inheritance; mining coal would work such injury. *Murray* v. *Haverty.* 325

21. *Getting coals, when not waste.*—It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds. *Job* v. *Patton,* 329

22. *Same person tenant in common under adverse titles.*—Where there were two companies or sets of claimants asserting title to a lot of tailings deposited on certain ground and a party who was interested, as a tenant in common, in both titles, received and accounted for the profits of the tailings as a member of one of the companies, it was *held,* that he could not be called to account by a member of the other company *as a tenant in common* with him. *Clark* v. *Jones,* 342

23. *Tenants in common of oil with right to surface—Exclusive use of surface by mineral owner with right to subdivide.*—By four separate deeds B granted to C, for ninety-nine years, two tenth parts of the oil and mineral rights, excepting lead ore, in certain land; to D three tenths, to E two tenths, and to F three tenths. There was no reservation or exception save the lead ore. There was also an express grant of the right to enter and bore for oil, free right of ingress and egress, the right to erect derricks and other necessary structures, and to use the timber: *Held,* that the grantees were tenants in common, with the exclusive right to all the oil for ninety-nine years; that there was an express grant of exclusive occupation of so much of the land as was necessary for the enjoyment of the thing granted; and that the grantees had the right to divide the land into small tracts and lease the same, with the right to the lessees to enter upon such tracts for the purpose of taking oil therefrom. *Bronson* v. *Lane,* 348

24. *The right of the other co-tenants* to dig ore and deposit the rock on the surface is not an incumbrance, such as to prevent any co-tenant giving perfect title. *Marsh* v. *Holley,* 687

25. *Deed by co-tenant of severed interest.*—A co-tenant may sell his fractional interest in parcel of the tract in which he owns in common, where his co-tenants assent to the giving of such conveyance. *Id.*

26. *Possession of single tenant in common.*—The owner of an undivided interest in a mining claim is entitled to the exclusive possession as against plaintiffs showing no title in themselves. *Melton* v. *Lambard,* 695

See ACCOUNT; INTEREST, 1; LACHES, 1; LICENSE, 1, 2; PLEADING AND PRACTICE, 4; STATUTE OF LIMITATIONS, 1; WASTE, 2.

TENANT FOR LIFE.

1. *Opening new pits.*—Tenant for life of coal mines may open new pits or shafts for the working of the old vein of coals. *Clavering* v. *Clavering,* 358

TENANT FOR LIFE. *Continued.*

2. *Remainderman may work opened mines.*—One seized of lands wherein there are coal mines not opened, settles the lands on A in tail, remainder to B for life. A opens the mines, works them, and dies without issue; B may continue working in all mines lawfully opened. *Id.*

3. *When royalty goes to remainderman.*—Toll reserved on a lease of a mine made by tenant for life under a power, will go to the remainderman. *Bassett* v. *Bassett*, 359

4. *Reservation in lease descends to remainderman.*—If tenant for life, without impeachment, make lease for twenty-one years, reserving power to enter and cut timber, he may enter, and the timber, if cut, becomes part of his personal estate but his personal representative can not enter after his death; the power devolves on the remainderman. *Id.*

5. *Tenant for life may mine for sale.*—A tenant for life of land having coal mines opened on it may mine the coal not only for his own use, but also for sale. *Neel* v. *Neel*, 363

6. *He may also cut timber* on the land for use in his mining operations. *Id.*

7. *Devise of profits of coal mining among children and survivors.*—A testator devised that "all the coal in all my lands be kept and worked as a whole for the equal benefit of all my children during their lifetime," the children of any dying, to have the parents' share; if any died without issue the share "to go in equal parts to my surviving children and their lawful surviving children. All the coal in all my lands shall be kept together until worked out for the use of my children as above stated, and not sold or divided, bnt worked for the use of my heirs as above stated." *Held*, that the children took but a life estate in the profits of coal lands; the trust lasted only to the death of the last survivor, and after his death the children of those deceased would take a fee in the coal, if any remained; there was not a perpetuity. *Briggs* v. *Davis*, 58

See WASTE, 1.

TENDER.

1. *Release by vendee.*—The vendee who has placed his bond on record so as, to that extent, to cloud the vendor's title, can not treat the contract as rescinded and recover a partial payment without first tendering a release thereof. *Marsh* v. *Holley*, 688

2. *Return of purchase money.*—Where the vendor receives part of the purchase money, he must, before seeking relief in equity against the vendee, return or offer to return the amount received, with interest. *Hamill* v. *Thompson*, 696

See TIME, 3.

TIMBER.

1. *Public lands open to first appropriator.*—The right to mine for the precious metals can only be exercised upon public lands; and although it carries with it the incidents to the right, such as the use of wood and water, those incidents also must be of the public domain. *Tartar* v. *Spring Creek Co.*, 371

2. *The first appropriator* of land acquires the right to its peaceable enjoyment, including the trees growing thereon. *Rogers* v. *Soggs*, 375

TIMBER. *Continued.*

3. *Timber as between miner and ranch claimant.*—A mining claimant can not take the timber found growing on a neighboring ranch claim, on pretense of the necessities of the mine. *Id.*

4. *Government property in timber—Trespass.*—Although the timber on the public lands belongs to the United States, and its cutting is prohibited by law, this is no defense to trespass for taking timber, brought by the owner of the claim on which it was cut against the party who has taken it. *Id.*

5. *Occupants may cut timber.*—In providing for the occupation of the public lands for agricultural or mining purposes, the timber law is impliedly repealed, so far as to permit occupants to cut and use the timber upon their respective claims. *U. S.* v. *Nelson*, 381

6. *Miner's relations to timber on the claim.*—A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to purchase the same, but until he does so, he has a mere license to work the ground for the precious metals therein, and has no right to use the timber found thereon, except as the same may be necessary to enable him to mine the same conveniently. *Id.*

7. *Whether the timber-cutting is incidental to the mining* or the mining only a pretext to acquire the timber, is a question of fact upon the circumstances. Delay in patenting placer claim considered in this connection. *Id.*

8. *May not cut to sell.*—The defendant occupied seventy acres of public land as mining ground and cut timber from four acres thereof in advance of his mining operations, and disposed of the same for his own benefit, assigning as a reason therefor, that by cutting the timber in advance of the mining operations the stumps would rot and be more easily removed: *Held*, that this cutting was not necessary to the mining operation and, therefore, unlawful. *Id.*

See MEASURE OF DAMAGES, 6; TENANT FOR LIFE, 6.

TIME.

1. *Time is of the essence of the contract*, where one co-adventurer has borne the entire burden, and the other appears only at the end to claim to share the profit. *Willis* v. *Forney*, 389

2. *Option to pay or re-convey.*—Where the owner of a one third interest in land conveyed that interest to the owner of the other two thirds, and took a covenant from the bargainee that he would sell the tract to the best advantage, and pay the bargainor one fourth of the proceeds, but would not sell unless such one fourth would amount to $1,500, and in case no sale should be effected in six months, would re-convey to the bargainor, or pay him $1,300, and a sale was not effected till after the lapse of six months: *Held*, that the obligation to sell had ceased, and the bargainor could only claim a re-conveyance of his former interest in the land, or $1,300, at the election of the bargainee. *Hargrave* v. *Smith*, 395

3. *Time* as affecting the question of tender, considered. *Fisher* v. *Worrall*, 624

4. *Time to perfect title.*—The vendor is entitled to a reasonable opportunity to make a good title. *Marsh* v. *Holley*, 688

See AGENT, 1; VENDOR AND PURCHASER, 1.

TIN STREAMING.

1. *Right to flow acquired by grant, prescription or custom.*—The privilege of washing away sand, stone and rubble dislodged in the necessary working of a tin mine, and having the same sent down a natural stream running through the plaintiff's land may be the subject of a grant, and may be pleaded as a prescriptive right under the statute, to a declaration charging the defendants with throwing such stone, sand and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom. *Carlyon* v. *Lorering*, 397

TRESPASS.

1. *Receipt condoning trespass.*—A receipt in full from an authorized agent for rent is a full discharge, being subsequent to the alleged trespass, though the officer may never have accounted for the money received. *U. S.* v. *Gear*, 403

2. *Trespass by party in constructive possession.*—A warrant for unimproved land gives to the owner of it a constructive possession of the land which will enable him to maintain trespass for digging ore upon it, against one who has not an actual adverse possession of the land. *Baker* v. *King*, 404

3. *Trespass pending ejectment and adverse claims.*—From the time that a *caveat* is entered until the right to the patent is determined, in ejectment, neither party (unless in actual possession) has such a title as will sustain an action of trespass against the other. Therefore, though a party has the decision of the Board of Property in his favor, he can not maintain trespass on such title till the determination of the ejectment instituted by the opposite party. *Shœnberger* v. *Baker*, 412

4. *Damages not recoverable while title undecided.*—A decision giving damages to one party is not to be allowed while the contingency remains of a decision giving title to the adverse party. *Id.*

5. *Trespass by contractor against owner.*—A contract for the working of a mine, though not a lease, may give such exclusive possession of the mine as to enable the contractor to mantain trespass against the owner. *Shaw* v. *Wallace*, 420

6. *Recovery by plaintiff on his possession.*—Possession in the plaintiff is sufficient to enable him to maintain trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarron* v. *O'Connell*, 429

7. *Evidence in trespass against several defendants.*—Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *Aliter*, if a joint trespass has been proved. *Id.*

8. *No vuster is necessary to maintain trespass.*—Any unlawful entry is sufficient. *Rowe* v. *Bradley*, 431

9. *An officer putting a receiver in possession* of property of a party against whom he has no process is a trespasser. *Id.*

10. *Miners' entry upon private land.*—Miners have no right to enter

TRESPASS. *Continued.*

upon private lands—the minerals have passed with the soil. *Henshaw* v. *Clark*, 434

11. *Co-trespasser a competent witness.*—A co-trespasser, not joined as a defendant, is a competent witness for the plaintiff, to establish the trespass in an action for money had and received, in which the tort is waived. *Dundas* v. *Muhlenberg's Exrs.*, 437

12. *Lessors held for tenant's trespass.*—The lessors of a coal vein are liable as trespassers for the act of their tenant, in mining coal in the land of an adjoining owner, they having leased the particular vein of coal, authorized the sinking of the slope by which it was reached, and contributed to its expenses, believing that it would not extend beyond their own line; and the tenant having, by means of this slope, taken out coal from the adjoining property, and paid for the greater part of it to his lessors, a certain rent for each ton of coal mined by him. *Id.*

13. *Waiver of tort.*—In such case the plaintiffs may waive the tort, and sustain an action for the value of the coal, as so much money had and received to their use. *Id.*

14. *Technical trespass resulting in benefit to the complaining party.*—When there are two ways of abating a nuisance the least mischievous should be chosen; and the facts were held to justify such least mischievous course, although it had been initiated by trespass upon the land of a third party. *Roberts* v. *Rose*, 441

15. *Trespass maintained by partner, not owner.*—Two persons entered into partnership for mining, the lease being to one, to whom all the stock, fixtures, capital and property belonged exclusively, both being in possession. A joint action of trespass by both for injury to the mines is maintainable. *Douty* v. *Bird*, 454

16. *Trespass by person in possession or by owner.*—A person in actual possession of land may bring trespass for cutting timber thereon without showing title; and by statute the true owner, though not in possession, may maintain trespass. *Yahoola River Co.* v. *Irby*, 460

17. *Corporations liable to trespass.*—A mining corporation carrying on the business of mining is liable for its torts. *Id.*

18. *Possession essential in plaintiff.*—To maintain trespass *quare clausum fregit* the plaintiff must have actual or constructive possession of the *locus in quo* at the date of the alleged trespasses. *Hugunin* v. *McCunniff*, 463

19. *Vendor retaining other works on same vein.*—Defendant Hugunin, with others, conveyed to Cushman the Elkhorn lode and gave possession under such conveyance of certain workings, retaining possession of a drift and other works under another claim. Afterward developments proved that where Hugunin had worked was on the Elkhorn vein which he had sold, but Hugunin had not taken out ore except from the same works of which he had retained possession. *Held*, that plaintiffs, as vendees of Cushman, had no actual possession under which they could recover, and that they could not recover on the constructive possession arising out of their deed against the actual possession of defendants. *Id.*

20. *Trespass by plaintiff out of possession.*—Trespass can not be

TRESPASS. *Continued.*
maintained where the plaintiff is actually disseized and the defendant in adverse possession of the land. *Raffetto* v. *Fiori*, 469
See ASSUMPSIT, 1; MEASURE OF DAMAGES, 6, 7; POSSESSION I; TIMBER, 4.

TROVER.
1. *Trover will not lie against party in adverse possession.*—Trover for stone and gravel dug from land does not lie in favor of one who has the right of possession against one who has the actual adverse possession of the land under claim of title thereto. *Mather* v. *Trinity Church*, 472
2. *Bond to pay for ore taken bars trover.*—Ore was taken and carried away from an iron ore bed by a party, under claim of right; B., the owner of the land, took a bond of the parties who dug the ore, conditioned to pay all damages in case the title was decided against them. *Held*, that this was a bar to the action of tort for converting it, as against either the obligors or persons claiming the ore under them. *Briggs Co.* v. *North Adams Co.*, 482
3. *Possession of ore good against wrongdoer.*—The plaintiff, under the license of the owner of the soil to search for tin ore, had in searching for that mineral made certain excavations in the soil. The defendant carted away some of the soil which the plaintiff had so thrown out—the plaintiff not having abandoned his right to search the soil thrown out for ore. In an action of trover for the removal of the soil: *held*, that the plaintiff had, as against the defendant, a mere wrongdoer, a sufficient possessory title to the mass thrown out to enable him to maintain the action. *Northam* v. *Bowden*, 485
4. *Stone quarried by trespasser and attached to realty.*—The principal defendant quarried, dressed, sold and delivered to the trustee (garnishee) a quantity of granite and laid it down for a permanent walk on the trustee's premises. He obtained the stone without right, from the quarry of a third person, who, after the walk was laid, claimed them as his property: *Held*, that the property in the stone was in the trustee after they were laid into a walk, and that the trustee was indebted to the principal defendant, and liable as his trustee, at least, for the increased value of the stone, which was produced by their being quarried, dressed and delivered. *Jackson* v. *Walton*, 488
5. *Trover lies for coal* mined upon and carried away from the land of another by mistake. *Forsyth* v. *Wells*, 493
6. *Trover not maintainable without title.*—One who had been hired to take out stone from the quarry for a third person, by a contractor who has contracted with a turnpike company to stone a portion of their road, has no such property in the stones quarried by him, after his employer has abandoned his contract, as will enable him, after leaving possession, to maintain trover therefor against the agent of the company by whose order the stones thus quarried had been absolutely placed upon the road. *Castor* v. *McShaffery*, 498
7. *Conversion by company refusing to issue stock.*—The refusal of a corporation on demand to transfer stock to an assignee of shares upon invalid grounds entitles such assignee to recover its value against the company. *Bond* v. *Mount Hope Co.*, 500

TROVER. *Continued.*

8. *Trover for mining stock against assignees for benefit of creditors.*—Where a stock-broker failed and assigned his property for the benefit of creditors, but one of them, for whom he had purchased stock in certain companies, declined to accept the assignment and demanded stock in such companies then held by the assignees, and upon their refusal to deliver brought trover as for a conversion: *Held*, that the fact that the assignees did not have sufficient of such stock to fill all the broker's contracts therefor could not be urged as a valid objection to a recovery. *Boylan* v. *Huguet*, 503

9. *Brokers need not deliver identical stock purchased.*—In the ordinary transactions between principals and brokers, principals are not entitled to receive the identical shares of stock purchased on their order, and brokers are within their contracts so long as they are prepared to deliver on payment and demand certificates representing the requisite number of shares. *Id.*

10. *The damages awarded in trover should be* only such as necessarily flow from the wrongful act; that is to say, the value of the property at the time of conversion (for that is what one has found and the other lost), together with damages for the detention of that value (which is interest from conversion to judgment), and in addition any special damage which may legitimately arise out of matters in existence at the date of the tort. *Id.*

11. *Repeated conversion.*—In an action for conversion of stock, it is no defense that some other party took the property in the first instance. *Kuhn* v. *McAllister*, 512

TRUST.

1. *Descent of trust estates.*—Lands held in trust, upon the death of the trustee, descend to the eldest son, as at common law, and are not within the Statute of Descents. *Boston Franklinite Co.* v. *Condit*, 301

2. *Conveyance by trustee.*—When lands are held in trust by two, both the trustees must join to execute the trust. If one convey, the legal estate as to a moiety passes, subject to the trust. Whether both trustees must join in the same deed, *quære? Id.*

3. *Trustees, when not accountable.*—Trustees not answerable for having applied the trust property even to what turned out a losing adventure, if without fraud or negligence. *Wilkinson* v. *Stafford*, 522

4. *Trustee using infant's name but not his funds.*—Trustee not answerable for having engaged the infant's name in an adventure if, afraid of the consequences, he does not engage the property. (*Contra, Morton Eden's* case in the House of Lords.) *Id.*

5. *Trustee can not buy or sell.*—Trustee having engaged trust property in an adventure, can not sell either to himself or another. *Id.*

6. *No election allowed to trustee.*—The court views trustees with jealousy; and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit as he pleases. *Id.*

7. *Collusive recovery against trustee.*—The trustee of a mine can not be suffered to allow a collusive recovery in ejectment for the purpose of

TRUST. *Continued.*

recovering a claim held by him against the mine. Such conduct is a breach of trust, and the plaintiff (who claimed adversely to the legal title held by the trustee) will be enjoined from suing out a writ of possession on his recovery. *Irwin* v. *Harris*, 534

8. *All who participate in a breach of trust are jointly and severally liable*, and a purchaser concurring in a fraudulent breach of trust and actively participating in it and converting the property to his own use incurs a like liability with the fraudulent trustee. *Barksdale* v. *Finney*, 541

9. *Trust fund followed into company assets.*—The president and acting manager of a mining company, being also trustee in a marriage settlement, sells the trust property in violation of his duty and purchases it for the corporation; the corporation, being made a party to a bill for accounting, the beneficiary, after having exhausted the decree against the principal, may then pursue it in the hands of the corporation, or have a decree for the price at which it was purchased. *Id.*

10. *Resulting trust.*—Where one person pays the consideration and the conveyance is made to another, the latter holds the title in trust for the party who has paid the consideration. *Bayles* v. *Baxter*, 561

11. *A resulting trust may be defeated*, as well as established, by parol evidence. *Id.*

12. *Trustee bidding at his own sale—Bidding on tract with known reservation of minerals.*—Trustees, of whom Chew, who was beneficially interested in the trust, was one, sold land to H., reserving minerals. H. paid part of the purchase money. Other trust lands had been sold with similar reservations. The court decreed a sale of the subjects of the trust remaining unsold, the trustees being allowed to bid. The trustees sold the lands and also the minerals reserved under the tracts previously sold. The tract sold to H. was exposed and bought in by Chew for less than the balance due by H. *Held:* 1. That Chew bought only the minerals which had been reserved in the agreement with H. 2. That Chew, as trustee, knew of the sale to H. and his payment on account; and, 3. That although permitted to bid he was bound to make a fair sale and act on his knowledge of the sale to H. *Cadwalader's Appeal*, 565

13. *Knowledge of trustee presumed.*—A trustee is held to know of and be bound by what he has allowed to be done in his name, though acting by an attorney, and without personal supervision of details. *Id.*

14. *A trustee permitted to bid* at his own sale must act within the strictest line of his responsibility; and such permission will not allow a trustee to speculate on the trust. *Id.*

15. *It is a breach of duty* for a trustee to sell a claim at less than its known actual value. *Id.*

16. *After-acquired title a trust estate for a grantee's benefit.*—Title accruing to grantor after his grant must be in trust for the prior grantee; if conveyed afterward to another with notice, the second grantee will be substituted to the obligations of the grantor, but if the conveyance is executed under authority of prior grantee, the subsequent grantee will receive it free from all trusts attaching to the land, arising from the acts of the grantor. *Doyle* v. *Peerless Pet. Co.*, 569

TRUST. *Continued.*

17. *Owner of mining stock bound by acts of "trustee."*—Where mining stock was placed by the owner in the name of another person, as "trustee," on the books of the corporation, nothing more appearing, and such trustee hypothecated it to bankers, who had no notice of who the owner was, for moneys advanced by them to him: *Held*, that the owner was bound by the acts of the trustee. *Brewster* v. *Sime*, 573

18. *Word "trustee" in stock not notice of secret owner's equities.*—The mere addition of the word "trustee," after the name of a person to whom stock is transferred, is not sufficient to put persons dealing with the trustee upon inquiry as to the trustee's title, nor will it operate as constructive notice of the owner's equitable right. *Id.*

19. *"Trustee" of stock may sell or hypothecate it.*—The mere fact that a person holding the legal title of stock, and apparently having the right of disposition, is styled "trustee," raises no implication that he has not authority to sell or hypothecate it in the usual course of business. *Id.*

20. *One owner made trustee for all.*—An agreement whereby property owned in common is put in the name of one of the owners, to be held by him for the benefit of all parties "subject to such decisions as the parties may direct from time to time," gives him no right to sell the whole without the consent of all the owners; and a sale to a purchaser with notice can convey no more than his personal interest. *Palmer* v. *Williams*, 579

21. *Trustee bound by instructions.*—When authority in such case is given to the trustee to make sale on specified terms, he can not make it except in compliance with his instructions, and can not give credit where he is told to sell for cash. *Id.*

22. *Executors working mines in trust.*—A direction to executors to work and manage the coal under the lands of testator, and divide the profits among the children, creates an active trust. *Briggs* v. *Davis*, 585

23. *Cestui que trust in possession holds against trustee's deed.*—A grantee of a trustee who holds only the legal title to land stands in the shoes of the trustee. In an action by such grantee against the person entitled to the equitable estate who was in possession, for the recovery of the land: *Held*, that the plaintiff was not entitled to recover. *Smith* v. *Lookabill*, 588

24. *Informal transfer of equities.*—Deeds and proceedings showing value and *bona fides* may pass an equitable title though they might be insufficient to pass the legal title as such. *Id.*

25. *Resulting trust, how raised.*—A resulting trust in land can be raised only from fraud in obtaining the title thereto, or from the payment of purchase money when that title is acquired. *Bickel's Appeal*, 591

26. *Facts insufficient to raise a trust.*—In 1841 arbitrators appointed to settle a dispute between certain companies and O., in regard to the Phœnix tract of coal land, made an award to O. In 1842 O. assigned this award to P. as collateral security for a debt, P. to take his debt and pay the balance to O. In 1845 O. and P. entered into a written agreement to endeavor to purchase the Phœnix tract, and to divide the profits to

TRUST. *Continued.*

arise therefrom. In 1846 P. purchased the lands, took title in his own name and continued in possession until his death, when his devisee took possession and remained therein until 1858. In 1856 the executor of P., in making the final payment for the tract, was credited with the amount of the above award. O. made no claim to any interest in the tract during the life of P., and not until some two years after the legal estate had passed to his devisee, and the executor had no knowledge of O.'s claim when he made the settlement. In 1869 O. filed a bill in equity against the executor of P. and the devisee for an account of a share of the profits of the tract. *Held*, that the devisee held the tract free from any trust for O. *Id.*

27. *Trustee not liable for highest passing price.*—A trustee *ex maleficio* when he has acted in good faith is not liable to account for what he might have received on the sale of oil, but for what he actually has received. *Greenwood's Appeal*, 603

28. *Idem—Basis of accounting.*—In the absence of fraud or bad faith in the sales, the true basis of accounting was the actual sales. *Id.*

29. *Agent giving note of trustee of special fund.*—Defendants were trustees with power of sale, to secure a certain debt. Afterward a syndicate was formed to buy in the outstanding debts of the debtor corporation to the extent of the fund raised, $30.000, and the trustees under the prior trust deed were made trustees of the fund. They appointed an agent, who expended the entire fund in purchasing certain claims, and gave notes in the name of the trustees in purchase of other claims which the $30.000 subscribed were not sufficient to cover. *Held*, that the notes so given were in excess of his authority, and that the defendants were not liable. *Kahn* v. *Hamilton*, 608

See ACCOUNT, 14; EJECTMENT, 2; STATUTE OF FRAUDS, 2.

TUNNEL.

1. *The "line of the tunnel" does not mean the entire width* and length of the surveyed tunnel site, nor does the act provide for or authorize a tunnel site survey and location fifteen hundred feet in width. The policy of the government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. *Corning Tunnel Co.* v. *Pell*, 612

2. *The "line" of the tunnel*, having reference to the subject it was intended to describe, designates a width marked by the exterior lines or sides of the tunnel. *Id.*

3. *Tunnel contractor ousted under time clause, by pretense of slow work—Measure of recovery.*—By agreement under seal plaintiff agreed to sink shaft No. 4 on the Morris and Essex Tunnel, and to drive the headings from the shaft to meet other headings from the other shafts. Defendant was to furnish cars. It was agreed that if the work was not done to the satisfaction of the engineer, defendant might take possession and complete the work. Defendant did take possession under this clause, and plaintiff sued as for a tortious entry.

Plaintiff having produced evidence tending to prove bad faith on the part of the defendant, the court charged that if defendant, by unreasonably withholding the cars, caused the delay or designedly embarrassed

TUNNEL. *Continued.*

plaintiff in his work, and procured the engineer's action merely to get possession, etc., then the plaintiff should recover; that the clause as to furnishing cars, did not mean that defendant should furnish only such as might meet his whim, but as many as he could without inconvenience to himself in meeting the reasonable demands of the work as a whole, and that plaintiff, if entitled to recover at all, was entitled to recover as damages all the profit which would have resulted from completion of the work. *Held:*

1. That there was no error in the charge.

2. That the form of action was misconceived, and should have been upon the contract under seal; but by statute it was such error as did not defeat a recovery had on the merits.

3. That damages arising after the suit was brought were proper to be allowed by the jury. *McAndrews* v. *Tippett*, 616

See DISCOVERY, 1.

USAGE.

1. *Destructive usage.*—A claim destructive of the subject of the grant can not be set up by any usage. *Horner* v. *Watson*, 1

VARIANCE.

1. *Special demurrer.*—A discrepancy in figures in a complaint stating a good cause of action will not be reached by general demurrer. *State* v. *Northern Belle Co.*, 211

VENDOR AND PURCHASER.

1. *Defaulting co-purchaser.*—A bound himself to B to buy certain lands, and to let B have one third thereof, provided the latter paid one third of the price in three years. Afterward, A made a contract with the owner of those lands, and took his bond to make title to them. Subsequently, they rescinded the contract; whereupon, after the expiration of three years from the date of the contract between A and B, C purchased the lands in question, without notice that B made any claim to them: *Held*, 1. That B had no equity, upon the pretense of a claim upon A as owner of these lands, under the contract above stated, to pursue them into the hands of C. 2. The maxim "In equity, time is not of the essence of a contract," does not apply to bargains like the above, where it was incumbent on B to raise a part of the purchase money. 3. The obligation of A to B was personal, sounding in damages only, and did not attach to the land. *Willis* v. *Forney*, 389

2. *Purchaser in possession, taking profits.*—Order on purchaser, before conveyance, pending bill for specific performance, to pay into court installments due on account of the subject of contract, being a coal mine, and the purchaser in possession and working it. *Buck* v. *Lodge*, 623

3. *Equitable defense to purchase money.*—Defense upon equitable grounds may be taken to an action for purchase money, even at common law. *Fisher* v. *Worrall*, 624

4. *Undisclosed knowledge by purchaser of mineral value, no fraud.*—A person who knows that there is a mine on the land of another, of which the latter is ignorant, may nevertheless buy it. The ignorance of the

VENDOR AND PURCHASER. *Continued.*
vendor does not of itself render the transaction fraudulent on the part of the purchaser. *Harris* v. *Tyson*, 634

5. *Idem.*—The mere fact, therefore, that the vendee of a right to dig up all minerals and mineral substances of value, and remove the same from the land of the vendor, was aware, at time of the purchase, of the existence of a valuable deposit of sand chrome on the land, of the value of which the vendor was ignorant, though he knew of the deposit, is no ground for impugning the validity of the conveyance. *Id.*

6. *Contra, if he make false statements.*—If the vendee, during the negotiation for the purchase, had willfully made any misstatement of a material fact, and thus misled the vendor and induced him to sell at a lower price than he otherwise would, the contract would have been a cheat, and the conveyance void. *Id.*

7. *Possession of employe no notice.*—The possession of an employe is that of his employer, and does not operate to give notice of his equities. *Jenkins* v. *Redding*, 647

8. *Pretense of outstanding title.*—Where one of the plaintiffs sold to defendants a certain quartz lode, in which he in fact owned no more than four sevenths, but the defendants knew this when they purchased and bought in the outstanding interests for little or nothing, having treated them at the outstart as abandoned: *Held*, that they could not set up outstanding title to defeat specific performances. *Hitchens* v. *Nougues*, 649

9. *After-acquired title.*—Where defendants bought a quartz lode and as consideration granted to the wife of the vendor one third interest in the land, and afterward bought in an outstanding title known to exist at the time of the contract for little or no consideration: *Held*, that their subsequent purchase inured to the benefit of their vendee, the wife of the original vendor. *Id.*

10. *Evidence of payment out of stock proceeds allowed.*—In an action on a bond for purchase money of land, evidence for defendant, that the land was to be the basis of an oil and mining company, that the sum secured was to be paid, when realized, from the sale of stock, or, if the stock could not be sold, from the products of the land, is admissible. *Hoeveler* v. *Mugele*, 654

11. *Reservation of minerals constitutes defect in title—Prospect of litigation a ground to resist specific performance.*—Upon a sale of freehold land described as containing valuable limestone and freestone, one of the conditions provided that the purchaser should be considered to have accepted the title, unless he should, within a certain time, deliver to the vendor some valid objection to the title, and that, if any objection or requisition should be delivered and persisted in, the vendor might rescind the contract; and another condition provided that if any mistake should appear to have been made in the description of the property, or the vendor's interest therein, it should not vitiate the sale, but compensation should be given. The vendor's title deeds contained a reservation to the lord of the manor, of the right to the mines and minerals under part of the property; but the vendor asserted that by the custom of the manor, the lord's right did not extend to limestone and freestone, and that there

VENDOR AND PURCHASER. *Continued.*

were no other minerals under the property; the purchaser having claimed compensation, the vendor rescinded the contract: *Held*, that the purchaser's objection involved a question of title between the vendor and the lord of the manor, and that the vendor was entitled to rescind the contract, and a bill by the purchaser for specific performance, with compensation, was dismissed. *Mawson* v. *Fletcher*, 657

12. *Optional contracts of sale—Intermediate buyer entitled to advance in price.*—L., a non-resident, owned lands in West Virginia. D., his brother-in-law, residing in the State, wrote to him that he would take the land at $10 per acre, or to put his price per acre on the land, and he would sell it for what he could above that sum and retain the excess as compensation. L. replied by letter that he would take $10 per acre. D. telegraphed that he would take the land, and sent him his notes for the whole amount, which L. accepted and retained. Subsequently, and before the notes were due, D. sold the land for $20 per acre. L. refused to make a deed upon D.'s offering to pay off the notes, but it was agreed that the vendee of D. should pay off the notes, which was done, and the residue of the purchase money on sale between D. and the vendee was deposited in bank to await the result of the controversy between L. and D., and the notes were also deposited in bank. These notes were subsequently withdrawn from the bank by L. D. filed his bill for specific performance, charging a sale beween L. and himself in the nature of what is called "optional contracts of sale." L. claimed the transaction was one of agency on the part of D. The court below decreed that there was no sale between them, but allowed five dollars per acre as a compensation to D. for services. On appeal by L.: *Held*, that it was a sale at $10 per acre; but inasmuch as D. did not insist on the error of the court below in decreeing that there was no sale, he thereby waived the error in the decree in that particular, and it was affirmed. *Logan* v. *Dils*, 662

13. *Situation of contracting parties.*—In construing a contract and for the purpose of getting at the intention of the parties, their situation and all the circumstances surrounding the transaction may be considered. *Corbett* v. *Berryhill*, 671

14. *The vendee is not bound to take an imperfect title;* he can not be driven to assume risks and rely on the covenants in the deed for his remedy. *Marsh* v. *Holley*, 687

15. *Consideration money not paid.*—A vendee can not recover upon a covenant to convey, where he has never paid or tendered the consideration money. *Id.*

16. *Remedy for breach of contract of purchase.*—Where A held title to realty in trust for B, and at B's request conveyed to C, the payment of the purchase money being a condition precedent to the delivery of the deed, and the deed, having been delivered without compliance with that condition: *Held*, that on refusal of payment B had his election either to pursue his remedy at law against C, and thus affirm the contract, or to rescind the contract and seek equitable relief. *Hamill* v. *Thompson*, 696

See BONA FIDE PURCHASER; TENDER, 1, 2; TIME, 1, 4.

VERDICT.

1. *Verdict, when not disturbed.*—Although the preponderance of evidence is against the verdict, yet it will not be disturbed if there is some evidence to support it. *Lincoln* v. *Rogers*, 79

VESTED ESTATES.

1. *Statute null to divest vested rights.*—Vested rights can not be changed or divested by a subsequent statute. The act of 1868, attempting to change trust estates held in common to joint tenancies, can not operate upon past estates, although it was intended to be retroactive. *Boston Franklinite Co.* v. *Condit*, 801

WAIVER—See TRESPASS, 13.

WARRANTY.

1. *Warranty not implied on sale of mining claim—Title lost by vendee failing to represent.*—A contract for the sale and conveyance of an interest in certain mining claims in Montana, after stating the terms of sale and describing the property, stipulated that upon the payment of certain notes given as part of the purchase price, the vendor would make "a good and sufficient deed." The title to the claims was afterward lost by a failure to do the work required by the miners' rules in the region where the claims were situate: *Held*, it appearing that the parties only intended the sale and conveyance of a mere possessory right, that the covenant to convey contained in the contract did not amount to a warranty of title; that the vendor thereunder was only bound to execute a deed for the interest he possessed at the time of the contract; that he was not bound to protect and keep alive his interest in the claim by having the same worked in accordance with the miners' rules; and that the loss of title, by reason of the failure of the vendees and others interested to keep it alive, constituted no defense to an action on the notes given for the purchase money. *Corbett* v. *Berryhill*, 671

WASTE.

1. *Open mines.*—It is not waste in a tenant for life or years to work mines or quarries already opened. *Coleman's Appeal*, 222

2. *Waste by co-tenant.*—A tenant in common who uses the common property separately will be liable to his co-tenant for the destruction or wasting of the common property through his gross negligence, but he can not be held responsible unless the bill charges such waste. *Graham* v. *Pierce*, 308

See TENANTS IN COMMON, 21.

WATER-COURSE—See NUISANCE, 1.

WAY—See APPURTENANCES, 1.

WITNESS.

1. *Vendor as witness.*—A vendor who has not received all his purchase money is not a witness disqualified by interest in an action of trespass brought by his vendee against a third party. Rowe v. *Bradley*, 431

See TRESPASS, 11.

WORKINGS.

1. *Permission to work in the "usual" and "approved" way.*—A clause in a mining lease that the lessee may work in the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground mines for mining purposes, but does not suppose a custom to work the mines so as to injure or interfere with the rights of other property. *Davis* v. *Treharne*, . 60

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